This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

REPORTS

OF

CONTROVERTED ELECTIONS

IN THE

HOUSE OF REPRESENTATIVES,

OF THE

Commonwealth of Massachusetts,

FROM 1780 TO 1852:

THE CASES FROM 1780 TO 1834, INCLUSIVE, COMPILED FROM THE JOURNALS, FILES, AND PRINTED DOCUMENTS OF THE HOUSE, IN PURSUANCE OF AN ORDER THEREOF, AND UNDER THE DIRECTION OF A COMMITTEE APPOINTED FOR THE PURPOSE,

BY LUTHER S. CUSHING:

AND THE CASES FROM 1835 TO 1852, INCLUSIVE, IN PURSUANCE OF A RESOLVE OF THE GENERAL COURT, PASSED ON THE 18TH OF MAY, 1852,

BY

LUTHER S. CUSHING, CHARLES W. STOREY,
AND
LEWIS JOSSELYN.

BOSTON:
WHITE & POTTER, PRINTERS TO THE STATE.
1853.

[redacted] UNIVERSITY

Commonwealth of Massachusetts.

In the Year One Thousand Eight Hundred and Fifty-Two.

RESOLVES

For the Publication of the Reports of Cases of Contested Elections.

Resolved, That L. S. CUSHING, C. W. STORRY, and LEWIS JOSSELYN be, and they hereby are, appointed Commissioners to prepare and publish a new edition of the Reports of Contested Elections, prepared and published by said Cushing in pursuance of an order of the house of representatives of March 1st, 1834, including therein reports of all the cases which have occurred since the time of said publication.

Resolved, That the said Commissioners include in, or append to, the publication hereby authorized, all opinions given by the supreme judicial court at the request of either branch of the legislature, relating to the several subjects contained in the same, and also a digest of all the decisions of the supreme judicial court concerning the qualifications of voters, and the duties of town officers in presiding at elections.

Resolved, That fifteen hundred copies of the publication hereby authorized be printed by the printers to the state, and be distributed in like manner with other books printed by order of the legislature.

[Approved May 18th, 1852.]

93098

ADVERTISEMENT.

In the year 1834, the first mentioned of the commissioners named in the foregoing resolve, then clerk of the house of representatives, in obedience to an order of the house, compiled and published a collection of the decisions of the house, in cases of controverted elections, from the adoption of the constitution to the year 1834 inclusive. The plan, upon which that compilation was executed, was fully explained in the advertisement prefixed to the work. The present compilation consists of a reprint of the cases published in the former, making nearly one-half of the contents of the volume, with the addition of those which have since occurred; and as the same plan, substantially, has been followed, in the publication of the later cases, the advertisement to the first edition has been retained, as explanatory of the method upon which the whole work has been executed. While, however, the same general plan has been pursued, in making the present compilation, the commissioners have thought proper to vary therefrom in certain respects, chiefly in phraseology, which they will here explain.

In the first place, they have substituted the word "controverted," in the title, for the word "contested," and have made a similar change, wherever the latter word occurred in the body of the work. This change has been made in conformity with the established meaning, which belongs and is invariably given to these words in England, from whence the essential elements of our parliamentary and election law are derived,

and where election law constitutes a distinct and very important, as well as copious, branch of jurisprudence. There the word "contested" is applied exclusively to what takes place at the poll. An election is said to be "contested" when there are opposing candidates for the suffrages of the electors. The word "controverted" is applied to an election, the validity of which is called in question in the house. An election is *contested* at the poll, and *controverted* in the house. The word "contested" has the same meaning in this country, and is used in the same sense; but it is also used frequently in the sense of the word "controverted," as applicable to an election case, where, in the opinion of the commissioners, the latter term would be more appropriate.

Secondly, in speaking of the proceeding upon a report, they have used the phrase "agreed to," instead of the word "accept;" for the reason that the latter is not a parliamentary term, and is besides somewhat equivocal in its meaning; since it may signify the mere receiving of the report as a document, with quite as much propriety, at least, as the adoption of its contents or conclusions. The term "agreed to" is not only sanctioned by parliamentary usage, in this country, as well as in England, but is more significant and appropriate. The use of the former term is peculiar, it is believed, to New England.

Thirdly, the commissioners have substituted the words "petition" and "petitioners," for "remonstrance" and "remonstrants," wherever the latter terms have been used to denote the instrument by which, and the person by whom, the validity of an election is controverted. A remonstrance, strictly speaking, simply objects to the doing of something by the legislature or other body, to whom it is addressed; and in the British parliament is not receivable, unless it contains also a prayer; in which case, it is received and considered as a petition. The instrument, by which an election is questioned, is not a remonstrance merely; it prays that the election complained of may be set aside, and the member returned deprived of his seat, for certain reasons alleged, which it prays may be investigated by the house; or it prays that the petitioner may

be admitted to a seat, on the ground that he was duly elected, and ought to have been returned. The use of the word "remonstrance," to denote an election petition, is of recent origin and probably confined to this state.

For the reasons suggested, the commissioners have thought themselves justified, if not required, to depart from the current phraseology, in the particulars alluded to.

Besides these changes, the commissioners have made two or three others, to which they call attention.

The cases contained in the first edition have been carefully revised, and, in almost every instance, a new abstract or head note has been prepared, or the original one much enlarged, so as in either case to bring out more distinctly and fully than before the points decided.

Another change consists in the addition of further explanations to some of the earlier cases, which will, it is hoped, be found to render them more valuable as precedents.

Lastly, the commissioners have appended, to some few of the cases, particularly the older ones, notes illustrative of important differences between our election law, and that of England.

The commissioners have felt themselves somewhat embarrassed in fixing upon the best mode of publishing certain cases, in which the committees on elections have thought it necessary to report the evidence, particularly of the witnesses, at very great length. On the one hand, it was out of the question, without greatly increasing the size of the volume, to reprint the whole evidence; while, on the other, it was difficult either to select or condense, without incurring the risk of doing injustice to the case, the committee, or the house. The commissioners could only exercise their best jugdment, according to the circumstances of each particular case. In some instances, therefore, they have themselves condensed and stated the evidence; in others, they have selected and published the most material parts; in others, again, they have stated merely the conclusions of fact, drawn by the committees from the evidence, as well as their conclusions of law thereupon. In the two latter

classes of cases, therefore, the reader will meet with frequent references in the reports to facts and evidence, which are not stated elsewhere; but which will be found, generally, not to be material to the decision, and to give rise to no inconvenience or uncertainty.

The commissioners were directed to include in, or append to, their work, a digest of all the decisions of the supreme judicial court concerning the qualifications of voters, and the duties of town officers in presiding at elections. In executing this part of their commission, the commissioners have inserted a digest of the cases alluded to, which were not considerable either in number or extent, in the index or digest of the cases reported by them, with references to the volumes of reports in which the former are contained.

In a supplement the commissioners have added:—

1. An opinion of the justices of the supreme judicial court, given in 1807, on the question of the right of the inhabitants of unincorporated plantations to vote for governor and lieutenant-governor. This completes the series of opinions, given by the court, on the several subjects embraced in the present compilation.

2. The opinion of the court of common pleas, delivered by Hoar J., in the case of the *Commonwealth* v. *Ayer and others*, the mayor and aldermen of the city of Lowell, indicted for alleged illegal conduct, in their capacity of returning officers. This opinion, having only been printed in a newspaper, and being likely to be often referred to, in connection with the cases in the house growing out of the transaction complained of, has been thought worthy of preservation in a more accessible form.

3. The statutes of the commonwealth respecting elections, in force previous to the Revised Statutes. These statutes are obviously necessary to an understanding of our election law, as well since as before the revision; and being now superseded by the Revised Statutes, are not readily to be obtained.

4. The report of the clerk of the house, in 1828–9, on the issuing of precepts for new elections; of which, as originally

printed, there are not probably half a dozen copies in existence.

In conclusion, the commissioners take the liberty to remark, that, considering the inherent difficulty of the undertaking, and the nature of the means and materials for their work, they cannot venture to flatter themselves, that it will be found to be free from all errors; but, having bestowed much care on its execution, and taken what seemed to them to be abundant precaution against mistake, they confidently hope, that no oversight of theirs will prove to be of such a character, as to impair the value of the compilation.

LUTHER S. CUSHING.
CHARLES W. STOREY.
LEWIS JOSSELYN.

Boston, January 1*st*, 1853.

ADVERTISEMENT TO THE FIRST EDITION.

The following compilation has been made, in obedience to the order, inserted on the preceding page,[1] and under the general direction of the committee thereby appointed.

It has not been considered, by the committee, to be their duty, in virtue of the order above-mentioned, to make any selection of the cases to be published, among those, which properly come under the denomination of contested elections; but merely to direct the manner of their publication. So far as it has been found practicable, therefore, all the cases of that description have been reported, either briefly or in detail, according to their nature and importance. Some of the earlier decisions, though of no value, as precedents, have been shortly stated, for the purpose of showing the mode of proceeding, in use at the time. Where a decision was found to involve no principle, and to have no bearing, in the way of illustration, upon any preceding or subsequent case, the name of the town and the decision have been mentioned, without any detail of the facts. The same course has been pursued, in regard to most of those, in which there was no report, or, in which, the report was general. Where the papers, relating to a contested election, are missing, that fact is stated. It is believed, that some account has thus been given of all the cases, which have arisen since the adoption of the constitution.

[1] The following is a copy of the order referred to:—

HOUSE OF REPRESENTATIVES, March 1, 1834.

Ordered, That the clerk of the house prepare, under the direction of a committee of the house, and cause to be printed, a compilation of the decisions of the house, in cases of contested elections of its members: said compilation to be distributed in the manner provided for the distribution of the general statutes and resolves of the general court: and Messrs. THERON METCALF, of Dedham, HENRY W. KINSMAN, of Boston, and HENRY CHAPMAN, of Greenfield, are appointed to constitute the said committee.

Attest, L. S. CUSHING, Clerk.

The validity of an election, or the right of a member to his seat, has been controverted, in the greater number of instances, by means of a petition or remonstrance, from persons interested therein as electors: but cases have also occurred, involving questions of a similar character, and equally affecting the right of membership, in which, the election could not, with strict propriety, be said to be contested:—as, where the validity of an election has been inquired into on motion; where a person, claiming to have been elected, has petitioned to be admitted to a seat; or, where, in consequence of the removal of a member, or of his appointment to some office, it has been made a question, whether his seat was thereby vacated. Cases of this kind, being clearly embraced in the spirit of the order, have been reported. They are generally entitled, not by the name of the town, which has been usually adopted, but as the 'case" of such a person or member. The rules, orders, and votes of the house, whether in reference to a particular case, or to the subject of contested elections and the right of membership generally, have been inserted in their order, as explanatory of subsequent proceedings and decisions. The opinions of the justices of the supreme judicial court, upon questions submitted to them, relating to the right of membership and subjects connected therewith, have also been republished, either by themselves, or with the cases to which they relate. Though not included in the terms of the order, it was thought that they could not, with propriety, be omitted.

Two classes of cases, in which the right of membership has been drawn in question, have been noticed only incidentally, viz.: questions concerning the validity of the certificates or returns of members; and questions as to the right of the house to issue precepts, authorizing new elections, where the seats of members have been vacated. The former, until the practice of supplying the towns with blank forms was adopted, were very numerous. Since that period, they have been of such rare occurrence, that the publication of the decisions in relation to them, it is presumed, would be of but little, if any, practical utility. The right of the house to issue precepts has been a

subject of much and frequent discussion, from the first establishment of the present form of government. In June, 1828, the clerk was directed to examine the journals, and report therefrom all the instances, in which precepts had been issued or refused. His report was printed, and exists among the published legislative documents.[1] As these precedents cannot be of much use, except to the house when in session, and are already sufficiently accessible, it has not been thought important to include them in the work. For the same reason, all those cases, in which the right of membership has been affected, by the conduct of a member, subsequent to his election, have also been omitted.

The journals, files, and printed documents of the house, which have contributed in common to the contents of the present volume, have not been found, at all periods, to be of equal value and assistance, for the compilation of the cases; and, therefore, require to be noticed separately, in order to give a full and correct idea of the character of these reports.

The journals are almost the only source of information, in regard to election cases, for several years subsequent to the adoption of the constitution: and, during this period, though it was usual to refer subjects, relating to the right of membership, to a committee; yet, the purpose of such reference seems, for the most part, to have been, either, to ascertain whether an investigation ought to be instituted, or to enable the house to fix upon a mode of conducting the inquiry. If an investigation was determined upon, the parties were generally admitted to a trial upon the floor of the house, by means of oral testimony and depositions, and were heard in person or by counsel, as is now the practice before committees. When the examination was concluded, and the parties had withdrawn, the subject was discussed and the question taken, whether, upon the evidence adduced or the facts proved, the right of membership was invalidated.[2] The journals merely present a history of

[1] Reprinted in the Supplement.

[2] It was usual, when the house was about to proceed to the examination or hearing of a case, on the floor, to send a message to the senate, informing that branch, that it would not be convenient to receive messages, whilst thus engaged. When the hearing was terminated, the senate was notified of it, in the same manner.

the proceedings, and most frequently, without any statement of the facts. The result of this mode of trying the validity of an election has been, that the points raised and decided, and the facts involved in the early cases, can rarely be learned, either from the journals, or from the papers on file. In the January session, 1794, the practice of hearing parties and witnesses, before the house, was formally abolished; and, since that time, the mode of investigating contested elections and questions of membership, by means of committees appointed for the purpose, which had then been occasionally adopted, for some years, has been invariably pursued.

The papers on the files of the house, consisting of the petitions or remonstrances, the returns of members, the depositions taken by the parties, the certificates of town officers, and the reports of committees, constitute the principal materials for, and have all been carefully examined and used in, the preparation of the following reports. In a considerable number of cases, in which, it appears from the journals, that elections were contested, the papers have not been found, notwithstanding a thorough examination of the files. They have probably been taken, for the use of committees or parties, who forgot or neglected to return them. Considering the manner in which the files have been kept, and the very natural demand for precedents, to be used before committees, or in discussions in the house, the number missing is, perhaps, less than might have been anticipated.

For some time previous to the year 1810, and particularly at the May session, in that year, the number of contested elections had become very great, and the labor of committees proportionably increased. A degree of importance, too, began to be attached to the decisions, regarded as precedents. These causes led to the passing of an order, at the January session, 1811, for the appointment of a reporter; and DAVID EVERETT, Esq., then of *Boston*, was appointed to that office. He was also reappointed the following year. The duties of the reporter are thus stated in the order, viz.: "to record and report, in a book to be kept for that purpose, all the decisions of the

house, in cases of the contested elections of its members, which report shall contain the state of the facts, the leading arguments used in the discussion of the question, and the principle on which the house made its decision." At the May session, 1813, THERON METCALF, Esq., of *Dedham*, succeeded Mr. EVERETT in the office of reporter. He was reappointed the three succeeding years. The office was then abolished. The only case, known to have been reported by Mr. EVERETT, is that of *Belchertown*, in 1811.[1]

In pursuance of an order of the house, Mr. EVERETT made a compilation of cases, decided prior to his appointment; an edition of which was published in 1812, for the use of the members and for distribution. In this work, Mr. EVERETT seems to have confined his researches to the journals, and has thus been led into many errors, which would have been avoided, by an examination of the papers on file. The case of *Hopkinton*, in 1788, for example, is stated to have been decided in favor of one of the two opposing claimants of the seat, on the ground, that his certificate of election was signed by *three*, and that of his opponent by only *two*, of the selectmen.[2] This collection was not known to be in existence, until the cases, for the period, during which it professes to extend, had been compiled from the journals and files, and consequently, no use has been made of it. Mr. METCALF commenced his labors as reporter, in 1813, and, from time to time, published the cases, decided whilst he was in office. They have all been republished, together with his notes, in the present volume.[3] Since the office of reporter was abolished, the reports of the committees on elections have been frequently published, for the temporary use of the house, previous to being acted upon, and, with other printed documents, have been preserved for several years past.

The reports of committees, where they have been found to contain the statement of a case, have been republished entire,

[1] See Reports, p. 103. [2] Same, p. 26.

[3] The cases from p. 124 to 185, inclusive, were originally reported by Mr. METCALF, with the exception of *Woburn*, p. 152; *Sutton*, p. 154; *Marblehead*, p. 172; *Case of Daniel Merrill*, p. 175; *Dedham*, p. 182; and *Case of Solomon Aiken*, p. 194.

with the exception of the formal and introductory parts. In some few instances, verbal corrections and alterations have been found necessary. The introductory notes or abstracts of the cases are intended to present the most material points decided. In many instances, however, this has been found to be impracticable; and, in such, the subject only of the decision has been stated. Care has been taken to avoid an overstatement; and therefore, where a point seemed doubtful, it has been thought most proper, to leave it entirely to the judgment of the reader.

The compiler has occasionally taken the liberty, to add a remark of his own; either by way of explanation, or for the purpose of reference to other cases or authorities. Such additions are included in brackets. The proceedings in the house are referred to by the letters, J. H., (Journal of the House,) and the number of the volume and page.

L. S. C.

Boston, October 28, 1834.

CORRECTION.

The running title on the right hand pages, from 161 to 174, should be "1813–1814," instead of "1812–1813."

TABLE OF CONTENTS.

CASES REPORTED.

Adams, 1783–4, . . . 13
" 1836, (1st,) . . 326
" 1836, (2d,) . . 339
" 1840, . . . 391
" William B., 1827–8, . 251
" " " 1830–1, . 267
Aiken, Solomon, 1814–15, . 194
Amherst, 1780–1, . . 1
Andover, 1816–17, . . 205
Andrews, William O., 1850, . 588
Ashburnham, 1830–1, . . 264
Ashfield, 1850, . . . 583
Attleborough, 1828–9, . . 254
Austin, Jonathan L., 1803–4, . 47
Barnstable, 1840, . . 393
Barre, 1827–8, . . . 250
" 1838, . . . 365
Bath, 1805–6, . . . 51
" 1809–10, . . . 73
Bedford, 1837, . . . 351
Belchertown, 1810–11, . . 103
" 1842, . . 421
Berkley, 1829–30, . . 257
Bolton, 1852, . . . 650
Boston, 1810–11, . . . 90
" 1818–19, . . . 221
Braintree, 1840, . . . 395
Brookfield, 1843, . . . 459
Brown, William C., 1840, . 405
Burlington, 1843, . . 460
Burpee, Emory, 1838, . . 359
Cambridge, 1781–2, . . 3
Charlemont, 1829–30, . . 261
Charlton, 1787–8, . . . 24
Charlestown, 1813–14, . . 167
" 1819–20, . . 226
" 1844, . . 518
Chatham, 1842, . . . 423
Chelsea, 1843, . . . 474
Chester, 1824–5, . . . 239
" 1852, . . . 664
Chesterfield, 1783–4, . . 7
Clarksburg, 1844, . . 514
Coleraine, 1842, . . . 436
" 1844, . . . 517
Concord, 1810–11, . . 85
Dana, 1847, . . . 551
Danvers, 1790–1, . . . 31
" 1805–6, . . . 49
" 1852, . . . 648
Dartmouth, 1843, . . 465
Dedham, 1814–15, . . 182
Dighton, 1809–10, . . 74
" 1814–15, . . 175
Downe, Joseph, Jr., 1825–6, . 244
Dresden, 1812–13, . . 151
" 1815–16, . . 201
Dunstable, 1785–6, . . 19
East Bridgewater, 1832, . . 272
Easthampton, 1843, . . 471
Easton, 1810–11, . . . 82
Elliot, 1813–14, . . . 166
Erving, 1843, . . . 508
Essex, 1839, . . . 382
Fairhaven, 1843, . . . 492

Fall River, 1844, . . . 533
Falmouth, 1816–17, . . 203
Fearing, Moses S., 1819–20, . 231
Fellows, Ja's K. and others, 1852, 639
Fowler, Silas, 1783–4, . . 9
Franklin, 1805–6, . . 52
Freeman, James M., 1846, . 543
Freetown, 1809–10, . . 72
Fryeburg, 1802-3, . . 41
Fuller, Elbridge, G., 1838, . 366

Georgetown, 1851, . . 599
Gerry, Elbridge, 1786–7, . . 23
Gill, 1832, . . . 274
Gloucester, 1810–11, . . 97
" 1816–17, . . 207
Gore, Christopher, 1789–90, . 29
Granby, 1843, . . . 506

Hadley, 1823–4, . . . 233
Hanover, 1851, . . . 592
Hartshorn, Eliphalet P., 1840, . 405
Harvard, 1806–7, . . . 59
Harvey, Moses, 1786–7, . . 23
Harwich, 1800–1, . . 38
Hawley, 1843, . . . 501
Hill, Dan, 1847, . . . 558
Hitchins, George and others, 1838, 378
Holliston, 1784–5, . . 16
" 1834, . . . 297
Holman, Ralph W., 1852, . 647
Hope, 1809–10, . . . 71
Hopkinton, 1782–3, . . 6
" 1788–9, . . 26
" 1852, . . 654
Hubbardston, 1839, . . 383
Hull, 1852, . . . 667

Kittery, 1784–5, . . . 15

Lanesborough, 1843, . . 473
" and New Ashford, 1810–11, . 84
" and New Ashford, 1811–12, . 125
" and New Ashford, 1814–15, . 183
Learned, Jeremiah, 1784–5, . 14
Ludlow, 1800–1, . . . 40
Lynn, 1824–5, . . . 236
Lynn, 1832, . . . 281
" and Lynnfield, 1813–14, . 171
Lynnfield, 1833, . . . 292

Malden, 1817–18, . . 213
" 1833, . . . 293
" 1838, . . . 377
Mansfield, 1784–5, . . 17
Marblehead, 1813–14, . . 172
" 1824–5, . . 235
" 1834, . . 295
Mendon, 1840, . . . 389
Merrill, Daniel, 1813–14, . 175
Methuen, 1842, . . . 428
Middleborough, 1787–8, . . 25
" 1811–12, . 135
Milford, 1851, . . . 609
Milton, 1812–13, . . . 146

Nantucket, 1814–15, . . 180
" 1815–16, . . 195
Nash, Thomas, Jr., 1843, . . 439
Needham, 1851, . . . 597
Newbury, 1814–15, . . 191
New Marlborough, 1836, . 323
Northampton, 1840, . . 391
Northbridge, 1838, . . 373
North Bridgewater, 1830–1, . 264
North Brookfield, 1812–13, . 137
North Chelsea, 1852, . . 644

Oliver, Francis J., 1842, . . 435
Orange, 1835, . . . 301
Otis, 1852, . . . 665
Oxford, 1809–10, . . . 75

Paris, 1803–4, . . . 45
Paxton, 1786–7, . . . 20
Pelham, 1829-30, . . . 262
Pembroke, 1786–7, . . 21
Perry, James, 1780–1, . . 2
Petersham, 1848, . . . 571
Phillipston, 1831, . . 269
Plympton, 1851, . . . 612
" 1852, . . . 643
Princeton, 1842, . . . 422

Raymond, 1810–11, . . 82
Rehoboth, 1805–6, . . 48
" 1811–12, . . 127

Rowley, 1843, . . . 456
Roxbury, 1813–14, . . 157
Russell, 1844, . . . 522

Sandford and Alfred, 1806–7, . 55
Sandisfield, 1837, . . 350
Sandwich, 1844, . . . 523
Sharon, 1815–16, . . . 195
" 1843, . . . 502
Sheffield, and Mount Washington, 1803–4, . . . 46
Sheffield, 1810–11, . . 83
Shelburne, 1808–9, . . 62
Shepley, John, 1825–6, . . 243
Sherburne, Selectmen of, 1838, . 362
Shrewsbury, 1832, . . 275
Somerset, 1849, . . . 576
Southbridge, 1817–18, . . 215
South Hadley, 1844, . . 534
Spencer, 1814–15, . . 178
" 1843, . . . 507
Standish, 1810–11, . . 82
Stearns, Asahel, 1817–18, . 217
Sterling, 1851, . . . 589
Sudbury, 1810–11, . . 81
Sullivan, 1800–1, . . . 39
Sunderland, 1852, . . 657
Sutton, 1810–11, . . . 80
" 1812–13, . . . 154
Swansey, 1783–4, . . 8

Tewksbury, 1842, . . 427
Tisbury, 1807–8, . . . 60
Topsham, 1802–3, . . 43
Townsend, James and others, 1852, 642
Troy, 1806–7, . . . 56
Truro, 1781–2, . . . 5
Tyringham, 1830–31, . . 266
Upton, 1840, . . . 403

Vassalborough, 1781–2, . . 4
" 1782–3, . . 5

Waite, John, 1807–8, . . 60
Warwick, 1840, . . . 401
Watertown, 1794–5, . . 36
Webster, 1844, . . . 526
Westborough, 1840, . . 392
West Boylston, 1840, . . 394
West Cambridge, 1849, . . 574
Western, 1812–13, . . 144
Westford, 1812–13, . . 141
Westminster, 1790–1, . . 32
" 1808–9, . . 63
West Newbury, 1851, . . 594
Weston, 1809–10, . . 67
" 1810–11, . . 78
West Springfield, 1808–9, . 64
" " 1832, . . 278
Wilbraham, 1840, . . 399
Williams, John, 1783–4, . . 10
" " 1785–6, . . 19
Williamstown, 1844, . . 526
" 1848, . . 573
Windsor, 1827–8, . . 250
Winslow, 1815–16, . . 201
Woburn, 1782–3, . . . 7
" 1812–13, . . 152
" 1835, . . . 302
Wood, Abiel, 1783–4, . . 12
Wrentham, 1809–10, . . 70

York, 1790,–1, . . . 30
" 1812–13, . . . 139

Gray, 1788–9, . . . 28

CASES NOT REPORTED.

1791–2.

Barnstable, ... 34

1792–3.

Shrewsbury, ... 35

1797–8.

Waltham, ... 37

1799–1800.

Medfield, ... 36

1804–5.

Natick, ... 47

1806–7.

Attleborough, ... 58

1807–8.

Chelmsford, ... 60

1809–10.

Boston, Bradford, Charlton, Durham, Harvard, Hingham, Mendon, Petersham, ... 76, 77

1810–11.

Easton, ... 82

1811–12.

Ashby, Boston, Bradford, Cambridge, Canton, Franklin, Hopkinton, Malden, Milton, Portland, Rochester, Wiscasset, Wrentham, . 135

1812–13.

Andover, Buxton, Cape Elizabeth, Elliot, Falmouth, Limington, Randolph, Standish, Thomastown, Uxbridge, Wrentham, . . 153, 154

1813–14.

Sandford, Steuben, Sullivan, ... 174

1816–17.

Malden, ... 213

1819–20.

Fryeburg, Randolph, ... 232

1832.

Bridgewater, ... 281

1833.

Adams, Norton, ... 294

1834.

Mendon, Pepperell, ... 300

1843.

Bolton, Chilmark, Goshen, Lowell, Milton, Northborough, . . 509

RESOLUTIONS AND RULES OF THE HOUSE.

1787–8.

Number of representatives, how determined by ratable polls, . 24

1805–6.

Concerning ratable polls, ... 49

1808–9.

Concerning ratable polls, ... 64

1810–11.

Voting of member on the question of the validity of his election, . . 97
Concerning controverted elections, ... 116

1811–12.

Concerning controverted elections, ... 134, 135

1812–13.

Rule of one house not binding upon another, ... 146

OPINIONS OF THE SUPREME JUDICIAL COURT.

1810–11.

On the question, whether aliens are ratable polls, ... 117

1815–16.

On the question, whether a town can constitutionally vote not to send a representative, ... 198

1826–7.

Concerning the filling of vacancies in the house, and the election of members thereof to the council, ... 245

1832.

Containing an exposition of the phrase "citizens exempted by law from taxation," in the third article of the amendments to the constitution, . 285

1836.

On the question, whether the assessors of a town have authority, after the assessment of a general tax has been made, and committed for collection, to assess a poll or other tax on any person otherwise qualified, for the purpose of enabling him to vote at an election, ... 343

1839.

Concerning the right of representation, where a town is divided, or a new town incorporated from territory of one or more existing towns, . 386

1840.

On the question, whether a meeting for the election of representatives, held on the fourth Monday of November, can be adjourned to another day, 407

1841.

On the question, whether persons, residing on lands ceded to the United States, thereby acquire the rights, and become subject to the duties, of inhabitants of the towns, within which such lands are situated, . 416

1843.

Concerning the liability to taxation, and the right to vote, of students

resident at a public institution, for the purposes of education, in the town where such institution is situated, ... 510

1844.

On the question, whether persons, exempted by the assessors from taxation on account of their poverty, are entitled to vote, if otherwise qualified, as persons exempted by law from taxation, ... 535

1851.

Concerning the constitutional power of the legislature to change the boundary lines of counties, ... 634

REPORTS ON SPECIAL SUBJECTS.

1835.

Report of the attorney general, (Hon. James T. Austin,) on the subject of ratable polls, ... 308

1838.

Report of the committee on the judiciary, on the right of representation, where a town is divided, or a part of one town annexed to another, . 379

1840.

Report of a special committee, on the right to vote of a person over seventy years of age, who has not been taxed within two years previous, . 413

1841.

Report of the committee on the judiciary, as to the right to vote of persons residing in towns where no state or county tax is assessed, . . 414

1842.

Report of the committee on the judiciary, as to the right of students, resident at a public institution, for the purposes of education, to vote in the town where such institution is situated, ... 436

1843.

Report of the committee on elections, on votes for ineligible candidates, . 496

SUPPLEMENT.

Opinion of the justices of the supreme judicial court, concerning the right of inhabitants of unincorporated plantations to vote for governor and lieutenant-governor, ... 669

Opinion of Hoar, J., in the case of the Commonwealth *v.* Ayer and others, mayor and aldermen of Lowell, ... 674

Statutes concerning elections, in force previous to the passing of the Revised Statutes. 686, 726

Report on the issuing of precepts for new elections, . . . 714

REPORTS

OF

CONTROVERTED ELECTIONS.

1780—1781.

AMHERST.

A PETITION was received at the October session,[1] from sundry inhabitants of the town of Amherst, praying that a precept might be issued to them, for the choice of a representative, in place of Nathaniel Dickinson, Jr., returned a member from that town, whose election they alleged to be illegal. The petition was referred to a committee, who reported[2] by way of resolve, which was read and agreed to, and in pursuance of which, a citation[3] was sent to the selectmen of Amherst to show cause, why the prayer of the petitioners should not be granted.

At the January session following, the petition, and an answer of the selectmen of Amherst thereto, were taken up and referred to a committee, who reported, by way of resolve, that the parties be heard, on the third Wednesday of the session, and that the selectmen give notice thereof to the petitioners, by serving them with a copy of the resolve. The report was not agreed to; but the question was immediately taken whether the member from Amherst was duly elected, and decided in the negative.[4]

[1] 1 J. H. 27. The first general court, under the constitution, commenced its session on the last Wednesday in October, 1780. See the journal of the convention of 1780, p. 186.

[2] 2 J. H. 55. [3] Same, 88. [4] Same, 191, 192.

A precept was then ordered to be issued to the town of Amherst for a new election.[1]

[The papers in this case are missing from the files; and neither the reasons, upon which the election was controverted, nor those upon which the house founded its decision, appear on the journal.]

CASE OF JAMES PERRY, MEMBER FROM EASTON.

Conduct and character of member inquired into.

In the general court, for the year 1779, a committee had been appointed, to inquire into the conduct of James Perry, a member from Easton, relative to his having sold a quantity of rye for the troops of this state, then on service in Rhode Island, at an extravagant price. The committee reported the following statement of facts:—

"That, on a representation of the distressed situation of the troops at Rhode Island, for want of bread, and the difficulty of procuring any there, for continental currency, the said Capt. Perry, being then in the house, declared his willingness to supply a quantity of flour for continental money, and immediately repaired home, where he found a number of his teamsters, returned with rye instead of flour, and although Capt. Perry would insinuate, that the rye was not his, because he was to receive flour, yet it appeared to the committee that this insinuation is only an evasion, for said Perry did, in fact, go with the teamsters to Col. Carpenter, who was purchasing for said troops, and did, at least, help sell said rye for the exorbitant price of eighteen shillings per bushel, in the new money, and that said Perry did receive the money, but agreed to return it to Col. Carpenter, any time within two months, at the rate of eight shillings hard money for eighteen of the new.

Whether such conduct in a member has not a direct ten-

[1] 2 J. H. 192.

dency to destroy the credit of our new money, the committee submit to the consideration of the house.

The committee beg leave to report, as their opinion, that the committee, for purchasing beef, &c., be directed to redeem the aforesaid new money, by paying hard, agreeably to the aforesaid agreement; that so the state may suffer as little as possible by means of that gentleman's so egregiously and contemptuously undervaluing of the new money."

This report was read, and ordered to lie till the next general court; and at the October session, 1780,[1] Mr. Perry being again returned a member, a committee was appointed to take the subject of the report into consideration.

The committee subsequently[2] reported, as their opinion, that Mr. Perry had no intention of depreciating the currency or injuring the state. The report was agreed to.

[1] 1 J. H. 30. [2] Same, 56.

1781—1782.

CAMBRIDGE.

A piece of paper, given in as a ballot, having the name of a candidate written upon it twice, cannot be severed and counted as two votes.

A PETITION was received, at the May session,[1] from sundry inhabitants of the town of Cambridge, setting forth that Samuel Thatcher, the member returned from that town, was illegally chosen, and praying that his seat might be vacated, and a precept issued to them for a new choice. The petition was referred to a committee,[2] upon whose report, the petitioners were ordered to notify the selectmen and town clerk of Cambridge, to appear on the fourth day of June in the same session, to

[1] The second general court, under the constitution, commenced its session on the last Wednesday in May, 1781, agreeably to the provision of that instrument.
[2] 2 J. H. 9.

show cause, why the seat of Mr. Thatcher should not be vacated.[1]

The petitioners alleged, that Mr. Thatcher was elected by a majority of one vote, and, that among the votes given in, there were two votes in his favor, on one piece of paper, which, when the votes were sorted, were severed by the town clerk and counted.

The parties to question the election, at the time assigned made their appearance on the floor, and after having been heard, withdrew. The question was then put, whether Mr. Thatcher was legally chosen, and passed in the affirmative."[2]

[The only paper, remaining on the files, in this case, is the petition.]

VASSALBOROUGH.

Character and conduct of member inquired into.

The election of Abiel Lovejoy, returned a member from the town of Vassalborough, was controverted by sundry inhabitants of that town, on the ground, that illegal votes were received, and also, that said Lovejoy "was not friendly to the cause of America."[3]

The memorial was accompanied by depositions, tending to prove the facts therein alleged, and having been read, a time was assigned for hearing the petitioners.

The parties were accordingly admitted[4] upon the floor, and, after hearing them and their witnesses, and the defence of Mr. Lovejoy, it was

Voted, That the election of Abiel Lovejoy is not proved to be illegal;[5] and that the further consideration of the charges against his character, as a person inimical to the government, and the prayer of the petitioners, that he may be excluded from a seat, on that account, be referred to the next session,

[1] 2 J. H. 12. [2] Same, 28, 31. [3] Same, 379. [4] Same, 387. [5] Same, 389.

and that Mr. Lovejoy have leave of absence, until that time, to prepare for the trial thereof.[1]

Previous to the next session, it appears,[2] that Lovejoy, instead of preparing for the trial of his case, "settled" the affair, with the principal petitioners, by agreeing that "he would not attempt to sit in the honorable house again;" and, the parties not appearing at that time, no further proceedings took place.

TRURO.

Qualification of a member as to property.

THE selectmen of Truro, in their return of a member, stated, that he was duly elected, but, that according to the last year's state tax, he did not possess the estate required by the constitution to entitle him to a seat. The return was ordered to lie on the table.[3]

[1] 2 J. H. 391.
[2] This is stated in the memorial of Denis Getchell against Lovejoy's election the next year.
[3] 2 J. H. 11.

1782—1783.

VASSALBOROUGH.

Where a petition was presented against a member, praying that he might be excluded from the house, on the ground of his being "inimical to the government," and evidence was given in support of the charge, it was ordered that such member withdraw from the house, and that the case be heard, upon evidence to be produced by the parties, at the next session.

The statements of a member, made in his place by direction of the house, received as evidence.

ABIEL LOVEJOY being returned a member from the town of Vassalborough, and having been qualified and taken his seat, a petition was received from Denis Getchell, praying that Lovejoy might be excluded from the house, on the ground that he was inimical to the government.

The petition was referred to a committee, who made a verbal statement of facts, whereupon the secretary of the commonwealth was directed to lay before the house, the records of the council and certain papers on file, relating to Lovejoy's character and conduct. One of the members was also called upon, and related a conversation, which had passed between him and Lovejoy, relative to public affairs. The committee were then directed to prepare and report an order, for the hearing of the matter at the next session, which having been attended to by them, it was

Ordered, That the said Abiel Lovejoy withdraw from the house: that the said Getchell bring forward his evidence against him, on the second Wednesday of the next session: that Lovejoy have leave, in like manner, to produce evidence in his favor: and, that said Lovejoy and Getchell be served with a copy of the order.

Lovejoy afterwards petitioned, that his case might be examined and tried, by a committee near the place of the residence of the parties concerned, but his request was refused. It does not appear that the subject was brought forward at the next session.[1]

HOPKINTON.

The validity of an election may be inquired into on motion.

Upon a motion made and seconded, for an inquiry into the qualifications of the member from Hopkinton, a question was put, whether the house would enter into the consideration of the right to a seat of any member or members, in consequence of a motion made for that purpose, upon the member [making it] declaring that he stands ready to prove the disqualifications, and [it was] determined in the affirmative. The motion then subsided.[2]

[1] 3 J. H. 251, 279, 281, 282, 283, 288, 290, 302, 347, 359. [2] 3 J. H. 90.

WOBURN.

The certificate of a constable, of the warning of a meeting for the choice of a representative, was held to be conclusive evidence of such warning.

THE committee on the returns reported, that the return from Woburn was represented as illegal by certain petitioners from that town, and thereupon a time was assigned for the consideration of the said election.[1]

At the time assigned, the house proceeded to the consideration of the case, and the parties were admitted upon the floor. Mr. Johnson (the member returned) laid upon the table a certificate of the warning of the town meeting, at which he was elected, from a constable of the town of Woburn: whereupon a question arose, whether a certificate, from the constable of any town, [of a warning] of the inhabitants, for choosing a representative, shall be conclusive evidence of such warning, which question was decided in the affirmative.

After a full hearing of the case, it was voted that Mr. Johnson was duly elected.[2]

[1] 3 J. H. 15. [2] Same, 25.

1783—1784.

CHESTERFIELD.

An election, effected by illegal votes, is not confirmed by a subsequent refusal of the meeting to reconsider the choice.

ON the representation of Benjamin Bonney, one of the selectmen of the town of Chesterfield, that the election of Russell Kellogg, returned a representative from said town, was illegal, Messrs. *Mitchell*, of Bridgewater, *Curtis*, of Worcester, and *Hosmer*, of Concord, were appointed a committee to inquire into the matter of his election.[1]

[1] 4 J. H. 76.

The committee reported the following statement of facts, viz. :—that, immediately after the selectmen had declared the choice,[1] the [qualifications of some of the] voters were disputed, and seven or eight persons said to have no right to vote, not being qualified according to the constitution, four of whom appear to have no right to vote, and, the others, the committee could not ascertain, whether they had or had not: that, upon a motion made in the meeting, for a reconsideration [of the choice,] it passed in the negative: that the number of selectmen in Chesterfield is three, one of whom is Mr. Kellogg (the member,) and the other two, considering the choice to be illegal, refused to certify, but one of them being told by Mr. Kellogg, that if he did not certify, he would be subjected to a fine, afterwards signed the certificate.[2]

Upon this report, after debate, it was made a question, "whether there is legal evidence, that Mr. Russell Kellogg was chosen a representative for the town of Chesterfield?" which being put, it was determined in the negative: number of members 109, yeas 42.

A precept was, the same day, ordered to be issued for a new election in Chesterfield.[3]

SWANSEY.

A member, disqualified "from holding any post of honor or profit," by a resolve of a former general court, is thereby rendered ineligible.

Jerathmiel Bowers being returned a member from the town of Swansey, the selectmen of Rehoboth[4] and sundry inhabitants of Swansey petitioned, that he might be excluded from a seat, on the ground, that "he had not shown himself friendly in the late struggle with Great Britain," and also, that he was disqualified by virtue of a resolve of a former general court.

[1] It does not appear in the report, but is stated in Bonney's petition, that the whole number of votes given in was 54, of which Mr. Kellogg received 30.
[2] 4 J. H. 97. [3] Same, 101. [4] Same 16.

The subject was referred to a committee, who reported,[1] that, by a resolve of the general court, passed April 7th, 1777, the said Jerathmiel Bowers was disqualified from holding any post of honor or profit in this commonwealth, which resolve, in the opinion of the committee, was still in force, and that Mr. Bowers was therefore disqualified from holding a seat. The report was agreed to, and Mr. Bowers quitted his seat accordingly.

CASE OF SILAS FOWLER, MEMBER FROM SOUTHWICK.

The seditious conduct of a member is not sufficient ground for his expulsion.

It being represented, that Silas Fowler, the member from Southwick, had been instrumental in raising the late disturbances in the county of Hampshire, a committee was appointed to inquire into his character and conduct.[2]

The committee reported, that, the general character of Mr. Fowler was that of being a principal agent in exciting and promoting the disturbances which had lately taken place in the county of Hampshire, and, that he had said, "that he would spend his life and fortune but law should be suspended in the county of Hampshire, till they had a redress of grievances."[3]

The report was considered upon two successive days, and after long debate the question was put, "whether the said Fowler should retain his seat as a representative?" which passed in the affirmative, ninety members to fifty-five.[4]

[1] 4 J. H. 20. [2] Same, 37, 38 [3] Same, 41. [4] Same, 47.

CASE OF JOHN WILLIAMS, MEMBER FROM DEERFIELD.

A member, who had been excluded from the house at the first session, as a person incapable of being a representative, being elected and returned as a member at the second session, it was held, that, by such exclusion, he was rendered incapable of holding a seat in the house for the same general court.

JOHN WILLIAMS, having been returned a member from the town of Deerfield, at the May session, a committee was appointed to inquire into his political character and conduct, and to consider the propriety of his holding a seat.[1]

By the report of the committee[2] and certain papers laid before the house at their request,[3] by the secretary, it appeared that Mr. Williams had been arrested and put under bond, by the governor and council, (in pursuance of a resolve of the general court, passed March 10, 1781,[4]) to appear at the superior court of judicature, held at Springfield, in September, 1781, to answer to such matters, as might then and there be objected against him, touching his conduct, in the war with Great Britain.[5]

The attorney general, being called upon for the purpose, appeared and stated, that he had not received any papers or evidence, to enable him to take measures for prosecuting Mr. Williams,[6] and consequently that no prosecution had been instituted against him. He was thereupon directed to inspect the papers on file in the secretary's office, relative to Williams

[1] 4 J. H. 149. [2] Same, 160. [3] Same.

[4] The following is a copy of this resolve.

Resolve requesting the governor, with advice of council, to restrict John Williams, Seth Catlin, and Jonathan Ashley, in such a manner as the commonwealth may receive no injury.

Whereas it appears to this court, from the examination of John Williams, Seth Catlin, and Jonathan Ashley, touching the instructions given the representatives of the town of Deerfield, and from the particular time at which these instructions were given, that there are just grounds of suspicion, that the said John Williams, Seth Catlin, and Jonathan Ashley, are unfriendly to the independence of the United States.

Therefore, Resolved, That the governor, with advice of council, be, and he hereby is, requested to lay the said John Williams, Seth Catlin, and Jonathan Ashley, under such restrictions, as that the commonwealth receive no injury from them or either of them.

[5] See the "Case of John Williams," 1785—1786. [6] 4 J. H. 164, 168.

and others, and to commence a prosecution against the persons mentioned therein, if there should appear foundation for a criminal proceeding against them.

A motion was then made and seconded, that Mr. Williams should be excluded from his seat, and after debate, the question was put and passed in the affirmative, 60 members out of 103 voting in favor of the motion.

A precept was issued to the town of Deerfield for a new election,[1] and, at the next session, Mr. Williams was again returned a member.[2] When he appeared to take his seat,[3] the house proceeded to consider the propriety of his being qualified, and it was made a question, whether the record of the vote, excluding him from his seat at the last session, without assigning any reason therefor, rendered him ineligible as a representative, in the present general court? which, being put, passed unanimously in the negative. It was then moved, that a committee be appointed, to inquire whether any prosecution has been commenced against Mr. Williams, or whether he is chargeable with any crimes or misdemeanors, which exclude him from a seat. The question on this motion was postponed to the afternoon, and in the meantime the treasurer was ordered to lay the bond abovementioned before the house.

In the afternoon, the treasurer appeared and produced the bond alluded to, which having been read, it was made a question, whether the house will go into the consideration of the disqualifications of Mr. Williams as a representative? which was determined in the negative. It was then voted, "that John Williams, returned as a representative from the town of Deerfield, at this sitting of the house, having been excluded this house in their last sitting, as a person incapable of being a representative for said town, in this general court, be excluded a seat, he, by the said former exclusion, being incapable of holding a seat in this house for this general court:" number of members present 114, yeas 78.[4]

[1] 4 J. H. 174. [2] Same, 177. [3] Same, 242, [4] Same, 243.

CASE OF ABIEL WOOD, MEMBER FROM POWNALBOROUGH.

Character and conduct of member.—Neglect of member to appear in his place, when ordered by the house, considered as a contempt.

It being represented, that Abiel Wood, the member returned from Pownalborough, had been put under bond for his good behaviour, the messenger was directed to acquaint him that the house required his attendance.[1] Mr. Wood not appearing, the messenger was inquired of, the next day,[2] by the house, in what manner he notified him of the order passed for his appearance in his place. The messenger informed the house that he left word at his lodgings, and was afterwards informed, that Mr. Wood received the notice and replied, that he would see some of the members, respecting the matter. A committee was then appointed to inquire into the conduct and character of Mr. Wood, and report what measures might be proper to be taken respecting him.

The committee, on the same day, reported a preamble and resolve[3] reciting, that "whereas a former general court did order that Abiel Wood should be confined until he should give bond, with two sufficient sureties, in the sum of one thousand pounds, conditioned, that he should not, in any way, correspond with any of the enemies of this country, and that he should appear at any time, and answer to any complaint, that should be made against him, which bond did not appear to be annulled or cancelled: and whereas he had been chosen and taken his seat as a representative, and had moved the house for leave of absence, which had been refused, notwithstanding which, and in derogation of the dignity of the house, he had absented himself, and although he had been notified that the house required him to attend in his place, yet in further contempt of the same, had refused to attend: therefore

Resolved, That the said Abiel Wood, be, and he hereby is, expelled the house, and his place is become vacant."

The report was agreed to.

[1] 4 J. H. 26. [2] Same, 29. [3] Same, 30.

ADAMS.

The refusal of the selectmen of a town, to admit the voters of a plantation, which had been annexed to it by statute, to act in town affairs, at the annual town-meeting. And to call another meeting for the purpose, was held sufficient to authorise the calling of a town-meeting by a justice of the peace, and the election of other selectmen and town-officers.

THE committee, appointed to examine the returns of the members from the several towns, reported[1] that the return from the town of Adams was double, and attested by two different persons, as town clerks: whereupon, the consideration thereof was referred to Messrs. *Davis*, of Boston, *Choate*, of Ipswich, and *Skinner*, of Williamstown. The committee subsequently[2] reported a statement of facts, as follows:—

"That in the year 1780, the plantation called New Providence, agreeably to the report of the committee sent to view the same, was, by an act of the general court, annexed to the town of Adams. It does not appear to the committee, that the town of Adams was notified previous to passing the incorporating act: but that, on the arrival of the same in said town, sometime in the summer after it passed, the town of Adams united with New Providence, as a corporate body, in the transaction of all town business, till the March following, all which time, they mutually chose town officers. And no interruption appears to have taken place, until March 1782, when the selectmen refused to admit the inhabitants of New Providence to vote or join with them at said meeting, whereupon the said inhabitants, with part of the inhabitants of the old town of Adams, withdrew from said meeting, and petitioned the selectmen to grant a warrant for calling a town meeting, to choose town officers, &c., but the selectmen refused to grant their request. The said inhabitants thereupon complained to James Harris, Esq., a justice of the peace, that they were unfairly and unconstitutionally debarred the privilege of voting for town officers, and also of having the town called together again agreeably to law, and requesting the said

[1] 4 J. H. 15. [2] Same, 24.

justice to issue his warrant for assembling said town, which he accordingly did, at which meeting, the said inhabitants made choice of selectmen and other town officers, and under the firm of said meeting have continued to transact all town business to the present time, and have elected Col. Jacob Stafford to represent them in the present general court, as appears by his certificate. A part of the former town of Adams have, ever since March, 1782, kept up a set of town officers, and have elected Capt. Reuben Kinsman, to represent them in the present general court."

The house proceeded to consider the report, and voted, that the elections were both illegal,[1] but, on the next day, reconsidered that vote, and after long debate, voted that the election of Stafford was legal, and that of Kinsman illegal.[2]

[1] 4 J. H. 24. [2] Same, 30.

1784—1785.

CASE OF JEREMIAH LEARNED, MEMBER FROM OXFORD.

Where it appeared, that a member was under indictment "for seditiously and riotously opposing the collection of public taxes," it was ordered, that his right to a seat be suspended, until he should have his trial on the indictment.

CERTAIN charges being said to be pending in the supreme judicial court, against Jeremiah Learned, the member from Oxford, it was ordered, that Messrs. *Fessenden*, of Rutland, *Sullivan*, of Boston, and *Chamberlain*, of Chelmsford, be a committee to inquire into and report a statement of facts relative thereto. The committee reported that he was under an indictment upon which trial was not had. They were then directed to consider, whether the charge was such as rendered Mr. Learned incapable of holding a seat. They reported, "that as the charge against the said Learned is for a trespass,

they can find nothing in the constitution, which considers him as a person disqualified to hold his seat." The house proceeded, on the next day, to consider this report, and after debate, resolved as follows, viz.: "Jeremiah Learned, Esq., returned as a member from Oxford, being indicted at the supreme judicial court, for seditiously and riotously opposing the collection of public taxes, and being bound by recognizance, with sureties, to appear and take his trial, at the supreme judicial court next to be holden at Worcester, within and for the county of Worcester, on the third Tuesday of September next, and in the mean time to keep the peace, and to be of good behavior:

Resolved, That the said Jeremiah Learned's right to hold a seat in the house be suspended, until he shall have his trial on the aforesaid indictment."[1]

At the next session,[2] a committee was appointed, to consider what further measures, if any, might be necessary to be taken, with respect to the case of Mr. Learned, but they do not appear to have made any report.

KITTERY.

It being alleged against a member returned to the general court for the year 1784—5, that he had been reported to be an enemy to the country, during the late war; that he had refused to aid in carrying it on; and that he had said he hoped Great Britain would conquer this country; it was held, that if these facts were proved, they would not render the member ineligible, or justify the house in excluding him from a seat.

Joshua Hubbard having been returned a member from the town of Kittery, a petition was received from a number of the freeholders of that town, praying that he might not be permitted to hold his seat, on the ground that he was inimical to the government.[3]

The petitioners alleged, that Mr. Hubbard had been reported an enemy to the country, through the most difficult periods of

[1] 5 J. H. 13, 18. [2] Same, 354. [3] 5 J. H. 51.

the late war, and had refused to lend his assistance in raising men or money to carry it on; that he had said, he hoped Great Britain would conquer this country, and had suffered himself to be carried to gaol, rather than take arms or pay his quota towards hiring soldiers to defend it; that he had associated with those who were open enemies to the country; that he had attempted to join the society called quakers, in order to avoid taking a part in the contest; and had subsequently relinquished his pretensions to quakerism, when the affairs of the country wore a more promising aspect.

The committee, to whom the petition was referred, reported, that it was not supported by evidence, and that if the facts set forth therein were proved, there would not therefrom arise sufficient cause to render the said Hubbard ineligible as a representative, or justify the house in excluding him from a seat. The report having been read, it was thereupon ordered, that the petitioners have leave to withdraw their petition.[1]

HOLLISTON.

Notice of town meeting.

The election of Staples Chamberlain, the member returned from Holliston, was objected to by sundry inhabitants of that town, on the ground, that there was not due notice given of the meeting, at which he was elected.

The petition alleged, that it had been the constant custom and established usage in Holliston, in regard to the notifying of meetings for the choice of representatives, under the former constitution, for the selectmen to post up a notification, at the public meeting-house, so that it might be seen by the inhabitants, on two public days, or fourteen days before the choice: that on the 7th day of May instant, the constable, by order of the selectmen, posted up at the public meeting-house, two notifications for two meetings to be held on the thirteenth day of

[1] 5 J. H. 62.

the same month, one for the choice of a representative, and the other for the transaction of town business: that there was no public meeting between the seventh and thirteenth of May, by reason of the infirmity of their pastor: and that, after the election of Mr. Chamberlain, at the meeting on the thirteenth instant, the meeting being opened for the transaction of town business, it was objected, that the meetings were not legally warned or notified, and thereupon the selectmen discontinued the second meeting, for that reason, and notified a new one.

The petition was referred to Messrs. *Hosmer*, of Concord, *Chamberlain*, of Chelmsford, and *Fairbanks*, of Bolton, who made a report thereon, which was *not* agreed to; and it was thereupon ordered, that the petitioners have leave to withdraw their petition.[1]

MANSFIELD.

Where, in a petition against an election, the member returned was charged with having obtained his election "by bribery, and by corrupting the minds of as many as he could by spirituous liquors," and by other improper and illegal methods, and evidence was offered in support of the charge, it was held, that the house had no constitutional right to suspend the member from acting as such, until the matter of the charge had been heard and determined.

The election of John Pratt, returned a member from the town of Mansfield, was controverted by John Dean and others, inhabitants of that town, on the ground, that he had obtained his election "by bribery, and by corrupting the minds of as many as he could by spirituous liquors," and by other improper and illegal methods. The remonstrance and sundry depositions accompanying it were referred to Messrs. *Fairbanks*, *Hosmer*, and *Thatcher*, who reported an order for the taking of further depositions, and also, that Mr. Pratt "be suspended from his seat in the legislature, until the matter is heard and determined by this house, whether his election was or was not agreeable to the constitution of this commonwealth;" which report was agreed to.[2]

[1] 5 J. H. 31, 37. [2] Same, 33.

In pursuance of the order, the parties procured additional depositions, which were received and referred to the committee,[1] who subsequently made their final report, declaring the election to be illegal.[2]

When this report was made, the consideration of it was deferred until the afternoon of the same day, and, in the mean time, Messrs. *Bacon*, of Stockbridge, *Osgood*, of Andover, and *Hunt*, of Watertown, were appointed a committee to consider, whether it is constitutional to suspend a member duly returned, when allegations are made against him, and before the house has considered and determined, whether such allegations are true or not.[3]

In the afternoon, the committee reported, "as their unanimous opinion, that, for the house to proceed to suspend a member duly returned, merely on the allegation of a number of individuals, be that number greater or less, is altogether repugnant to the principles of the constitution, and the spirit of all free governments, and, in its consequences, might deprive every member of the legislature of those essential rights, which, by the constitution, are secured to every citizen of this commonwealth:" which report was agreed to, and it was thereupon voted, that the resolve suspending Mr. Pratt be reconsidered, and that he be informed thereof.

The house then proceeded to consider the report of the first committee, declaring the election to be illegal, and admitted the parties to a hearing on the floor. The depositions were read, and witnesses examined, and on the afternoon of the second day, the question was taken, "whether from the charges exhibited against Mr. Pratt, of indirect proceedings at his election, and the evidence adduced, his seat ought to be vacated," and decided in the negative.[4]

[1] 5 J. H. 67. [2] Same, 71. [3] Same. [4] Same, 73, 74.

1785—1786.

DUNSTABLE.

The qualification of a member, as to residence, may be inquired into on motion.

On a motion, that the qualifications of John Pitts, Esq., returned a member from the town of Dunstable, should be inquired into as to residence, Mr. Pitts being heard on the subject, it was made a question, whether the reasons offered by him, relative to his holding his seat, were satisfactory to the house, and the question being put, it passed in the affirmative.[1]

CASE OF JOHN WILLIAMS, MEMBER FROM DEERFIELD.

Where it appeared that a member of the house in 1785—6 had been indicted in 1783, for the part he had taken in the then late war with Great Britain, in favor of the latter, and had been discharged from such indictment, as justly entitled to the benefit of the sixth article of the treaty of peace; it was held that the member's right to a seat was not thereby invalidated.

The eligibility of a member, as affected by his character and conduct, may be inquired into on motion, and the statement of evidence, by a member.

John Williams being returned a member from the town of Deerfield, Mr. White, of Rochester, laid before the house a copy of an indictment, found against him at the supreme judicial court, held at Springfield, in September, 1783, for sedition.[2]

The subject was referred to a committee, who reported, that at the supreme judicial court, held at Northampton, in April, 1784, Mr. Williams was arraigned upon the indictment, and pleaded that he was not guilty thereof, and also suggested to the court, that he was indicted for the part which he had taken in the late war, in favor of Great Britain, and that he was

[1] 6 J. H. 20. [2] Same, 57.

justly entitled to the benefit of the 6th article in the treaty between Great Britain and the United States, as adopted in a late law of the commonwealth, and prayed that he might be discharged from the said indictment: whereupon, the court, considering his case within the said article, discharged him. The committee therefore recommended that he be permitted to hold his seat. The report was agreed to.[1]

[1] 6 J. H. 70.

1786—1787.

PAXTON.

Where a meeting, which was held for the choice of a representative, and at which an election was effected, was adjourned to another day; and at the adjournment, it was voted to reconsider the votes passed at the previous meeting "respecting the choice of a representative;" it was held, that the election was not thereby invalidated, although the first meeting was very thinly attended, and at the adjournment, a much larger number of the inhabitants was present.

The return from the town of Paxton appeared to be nothing more than a certificate signed by the constable thereof, stating, that a meeting was held in said town, for the choice of a representative, in which the selectmen were present and presided, and, that on collecting and counting the votes, the presiding selectman declared, that the town had made choice of Hezekiah Ward, whom, being present, be then and there notified of his election:—The committee on the returns reported, that the same be submitted to the consideration of the house;[1] and, after debate thereon, it was voted that the matter subside.[2]

The selectmen of Paxton also petitioned,[3] that Mr. Ward might not be permitted to hold his seat, alleging, that a meeting was duly held in said town, for the choice of a representative, which was very thinly attended, at which, it was voted

[1] 7 J. H. 17. [2] Same, 17. [3] Same, 97.

to send a representative, and Mr. Ward was elected: that the said meeting was adjourned, and at the adjournment thereof, when a much larger number of the inhabitants was present, it was voted to reconsider the votes passed at the previous meeting, "respecting the choice of a representative:" that Mr. Ward was present at said adjourned meeting, and was also particularly informed of the reconsideration, by one of the selectmen: and that the selectmen, in consequence of the proceedings of the last meeting, refused to give Mr. Ward a certificate of his election, notwithstanding which, he had taken his seat, by virtue of the return above mentioned.

The petitioners, upon the report of a committee to whom it was referred, had leave to withdraw their petition.[1]

[It is quite probable, that the indulgence of the house, in allowing the member to retain his seat on such a return, was occasioned by their knowledge of the facts of the case, as they afterwards appeared in evidence.]

PEMBROKE.

The validity of an election being called in question, on the ground, that the member returned did not possess the requisite qualifications as to property, it was held, that the burden of proof was on the petitioners.

THE election of John Turner, returned a member from Pembroke, was objected to on the ground, that he did not possess the estate required by the constitution to qualify him for a representative. The petition of sundry inhabitants of that town, alleging his want of qualification, was referred to a committee,[2] upon whose report it was ordered that the parties be heard upon the floor, by council, and a time was assigned for the hearing.[3]

At the time assigned, the petitioners appeared by James Sullivan, Esq., as their council, and Mr. Turner in his seat. It was moved by the petitioners, that Mr. Turner should be

[1] 7 J. H. 141. [2] Same, 17. [3] Same, 58.

required to produce evidence of his qualification; whereupon, it was made a question, whether Mr. Turner ought to prove himself a qualified member, according to the constitution? and the question being put, passed in the negative, twenty-five members only, out of one hundred and thirteen, voting in the affirmative. The further consideration of the case was then postponed for one week, and a commissioner appointed, to take depositions, in the mean time, relative to the subject matter of the petition.[1] The house proceeded again, on the day to which the case was postponed, to hear the parties, and having fully heard them, it was moved and seconded, that the following be made a question, viz.: "whether it appears that John Turner is qualified, according to the constitution, to represent the town of Pembroke, in the general court?" It was then moved and seconded, that the said question give place to the following, viz.: "whether the evidence produced is sufficient to shew, that Mr. Turner, who has been admitted to vote as a qualified member for the town of Pembroke, is not qualified agreeably to the constitution of the commonwealth?" and the question being put upon such substitution, it passed in the affirmative. The question last stated was then taken, and determined in the negative.[2] The question was then put, whether Mr. Turner has a constitutional right to retain his seat, and passed in the affirmative.[3]

[1] 7 J. H. 60.

[2] The property qualification, which was required by the constitution until after the adoption of the thirteenth article of amendment, seems to have been rendered ineffectual to some extent, by the rule adopted in this case, and afterwards generally adhered to, requiring the petitioners to prove the disqualification, that is, that the member in question did not possess the requisite amount of property.

In England, where members of the house of commons, with some exceptions, must possess a certain amount of property, in order to be eligible, every member is required by statute, before he shall sit or vote, after the choice of a speaker, to deliver in at the table of the house a statement of his property qualification, and at the same time to make and subscribe a declaration, that, to the best of his belief, he is duly qualified. If he shall make a false declaration, or deliver in an untrue statement, he will be guilty of a misdemeanor; and an omission to make the statement and declaration will avoid the election.

[3] 7 J. H. 91, 92.

CASE OF MOSES HARVEY, MEMBER FROM MONTAGUE.

A member convicted of sedition, and sentenced to an ignominious punishment, expelled.

A MEMORIAL was presented at the January session against Moses Harvey, the member from Montague. The committee to whom the same was referred reported as follows :—

"Whereas Moses Harvey, representative of the town of Montague, stands convicted upon indictments for sedition, and for which he is sentenced to an ignominious punishment by the supreme judicial court, holden at Northampton, within and for the county of Hampshire:

Ordered, That the said Moses Harvey be, and he hereby is, expelled."

The report was read and agreed to, and it was ordered accordingly.

CASE OF ELBRIDGE GERRY, MEMBER FROM MARBLEHEAD.

The removal of a member, from the town for which he is elected, to another town within the state, does not disqualify him from holding his seat for the residue of the term.

A LETTER was received from Elbridge Gerry, Esq., one of the representatives from Marblehead, stating that he had removed to Cambridge, and requesting the opinion of the house, whether his removal was a "disqualifying circumstance." The communication was referred to a committee, who reported, "that, having examined the constitution, they can find nothing in the same incompatible with the said Gerry's serving the town of Marblehead, as their representative, the remainder of the present year, his having removed to Cambridge notwithstanding." The report was agreed to.[1]

[1] 7 J. H. 195.

1787—1788.

CHARLTON.

Where a member was charged with being under an indictment for seditious practices, and with being under bond, &c., the house refused to suspend him from acting as a member, until the indictment should have been determined.

The house being informed that the member from Charlton was under an indictment and bond for seditious practices, a committee was appointed to examine into the fact, and also to consider the matter at large.[1]

The committee reported, that, in their opinion, any member, against whom an indictment may have been found for seditious practices, ought to be suspended from acting in the house, until the same shall have been determined; but, as appears by a memorandum on the report, the subject was ordered to subside.

NUMBER OF REPRESENTATIVES.

How determined by the number of ratable polls in the several towns.

A committee having been appointed to examine into the number of ratable polls in the several towns in the commonwealth, and compare them with the number of representatives from the said towns,[2] and having made report:[3]—it was thereupon ordered, that the same committee report upon what principles, in what manner, and by what rules, questions, upon the returns of the number of representatives from the towns, ought to be determined.

The committee made a report,[4] which was agreed to, as fol-

[1] 8 J. H. 32. [2] Same, 32. [3] Same, 46. [4] Same, 72.

lows, viz.:—"That when any town in this commonwealth sends one or more members to represent them in the general court, more than they have a right by the number of ratable polls returned in the last valuation, agreeably to the constitution, the said member or members, to entitle them to their seats, shall produce, as evidence of the increase of the ratable polls to give them the right, an attested copy of the return of the last tax bill of said town by the assessors, who shall make oath to the same; and also, that said ratable polls were inhabitants one year at least preceding the election."

MIDDLEBOROUGH.

The house, having received a petition against an election, and assigned a time for the hearing thereof, allowed the same to be withdrawn at the request of the petitioners.

Joshua Eddy and others, inhabitants of the town of Middleborough, petitioned that Perez Thomas, returned a member from that town, might be excluded from his seat, on account of his political character and conduct, alleging him to have been friendly to Shays's proceedings against the government.[1]

The petition was presented at the June session and referred to a committee, who reported an order for the hearing of the case, on the first Tuesday of the next session of the general court, which was agreed to.[2]

At the next session, Eddy, in behalf of the petitioners, petitioned for leave to withdraw their petition, which was granted.[3]

[1] 8 J. H. 66. [2] Same, 107. [3] Same, 227.

1788—1789.

HOPKINTON.

Where two persons were returned by separate returns, from a town entitled to send one member only, each claiming the seat in opposition to the other, both were suspended from acting as members, until the election should be determined.

At a meeting for the election of representatives, the votes were brought in with some confusion and disturbance; the right of several persons to vote being questioned, after they had voted, one of them qualified himself by taking the oath, others refused to qualify themselves or to withdraw their votes, and one offered to withdraw his vote, but refused to state for whom he voted; and it was thereupon voted, that the whole matter should subside upon the last mentioned voter's withdrawing his vote, which was done accordingly: it was held, that these irregularities were not sufficient to invalidate the election.

A piece of paper, having the same name written upon it twice, constituting two ballots not separated, is, it seems, to be considered and counted as one ballot.

When an election has been legally made, it cannot be superseded or invalidated by another election made at a subsequent meeting.

The committee on the returns having reported, that there were two returns from the town of Hopkinton, one attested by three selectmen, by which it appeared, that Walter M'Farland was elected, and the other attested by two selectmen, by which it appeared, that Gilbert Dench was elected: it was ordered that Messrs. *Mason*, *Washburn*, *Osgood*, *Choate*, and *Fowler*, be a committee to consider the said returns, together with a petition of certain inhabitants of Hopkinton, praying that Dench may be allowed to retain his seat, and that until the election of a member for the town of Hopkinton shall be determined, both the gentlemen returned be suspended from voting.[1] The committee were enjoined to sit as soon as possible.

[1] In England, when there is a double return, the rule is stated to be (May's L. and P. of Parliament, 441,) that both members may claim to be sworn, and may take their seats; but that after the election of a speaker, neither of them can vote until the right to the seat has been determined; because both are to be precluded from voting, where one only ought to vote; and neither of them has a better claim than the other. One of the orders, adopted at the commencement of every session in the house of commons, is, "that all members, returned upon double returns, do withdraw till their returns are determined."

By the petition above mentioned, and other documents on file, the following appear to be the facts in this case:—

A meeting was duly warned and held in Hopkinton, for the choice of a representative, on the fifth day of May. The inhabitants, by a large majority, voted to send a representative, and the votes being called for, they were brought in, with some confusion and disturbance. The right of several persons to vote being questioned after they had voted, one of them qualified himself by taking the oath, others refused to qualify themselves, or to withdraw their votes, and one offered to withdraw his vote, but refused to tell for whom he voted. The moderator declared that the choice would not be constitutional, and desired the inhabitants to take back their votes and bring them in again, which they refused to do. After some debate, it was moved, and unanimously voted, that the whole matter should subside, upon the last mentioned person's withdrawing his vote. The vote was then withdrawn and torn up by the voter in the presence of the meeting. The poll being closed, and the votes sorted and counted, it appeared that M'Farland was elected by a majority of four votes over Dench, who was the only other candidate voted for. In counting the votes, there appeared to be one, which bore the same name written upon it twice, constituting two ballots not separated, which the selectmen declared, in the presence of the meeting, to be and counted as only one. Mr. M'Farland was then declared to be elected, the choice recorded by the town clerk, and certified by three of the selectmen, as abovementioned.

Several of the inhabitants, considering this election to be illegal, petitioned the selectmen to call a new meeting for the choice of a representative. The selectmen accordingly issued their warrant for that purpose, and at a second meeting held in pursuance thereof, on the sixteenth of May, Gilbert Dench was elected. This last election was certified by two of the selectmen, one of whom was the member returned, Mr. Dench.

The committee subsequently reported, that it was their unanimous opinion, that the election of M'Farland was legal, and that he was entitled to his seat, and that the election of

Dench was illegal. The report, after being considered, was agreed to.[1]

GRAY.

A minister of the gospel, though exempted as such from taxation, is not ineligible as a representative.

THE election of the Rev. Samuel Perley, returned a member from the town of Gray, was controverted by Samuel Nash and others, for several reasons, and among others for the following, as stated by the petitioners: "Because we suppose, that those, who impose taxes upon us, ought to be those only who pay a proportion of those taxes, which the said Perley, being a minister of the gospel, is not obliged by law to do."[2] The petitioners, upon the report of a committee, to whom their petition was committed, had leave to withdraw.[3]

[1] 9 J. H. 13, 20.

[2] In England, in the year 1801, the election of the Rev. John Horne Tooke gave rise to an inquiry, by a select committee of the house of commons, into the eligibility of persons in holy orders as members of that house. But the precedents collected by the committee were so obscure and inconclusive, that the house of commons refused, upon the authority of them, to declare Mr. Horne Tooke ineligible. The act of 41 Geo. III. c. 63, was thereupon passed, by which it was declared, "that no person, having been ordained to the office of priest or deacon, or being a minister of the church of Scotland," shall be capable of election as a member of parliament. See 35 Hans. Parl. Hist. 1402, 1414, 1542, 1544.

[3] 9 J. H. 51, 56, 139.

1789—1790.

MEMBERS HOLDING OFFICES UNDER THE UNITED STATES.

Persons holding offices under the government of the United States, similar to those, which, by the constitution of this state, are declared to be incompatible with holding a seat in the legislature thereof, are not eligible as members.

A COMMITTEE of both branches was appointed, to consider whether members of either house, who hold offices under the

United States, similar to those declared incompatible with their holding seats in the legislature of this commonwealth, by the constitution thereof, have a right to continue to sit as members.

The committee made a report in the senate, that members holding such offices ought not to retain their seats in either branch of the legislature. The report was rejected in the senate, and their proceeding thereon was sent to the house for concurrence.

It was then made a question in the house, whether persons, holding offices under the United States, similar to those, declared by the constitution of this commonwealth, incompatible with their holding seats in the legislature thereof, can have a constitutional right to retain their seats in this house? and after being debated on two successive days, it was taken by yeas and nays, and decided in the negative, yeas 24, nays 137.[1]

CASE OF CHRISTOPHER GORE, MEMBER FROM BOSTON.

The office of district attorney of the United States, for the district of Massachusetts, is incompatible with that of representative in the legislature of this commonwealth.

On motion, the house assigned a time to consider whether the seat of Christopher Gore, a member from Boston, had become vacant, by his acceptance of the appointment of attorney to the United States, within this commonwealth.[2] Mr. Gore[3]

[1] 10 J. H. 149, 180, 182, 183. The same subject was brought up the next year, and a bill reported, by a committee appointed for the purpose, "determining how far officers, in the pay of the federal government of the United States, shall be eligible to offices under the authority of the government of this commonwealth." The bill was rejected. See 11 J. H. 66, 82, 189, 289.

[2] 10 J. H. 189.

[3] It is an ancient and well established principle of the law of England, that all persons, who are free from disqualification, are eligible as members of the house of commons, even against their expressed inclination; and that after their election, they cannot renounce the office, but must serve in the trust conferred upon them; for the reason, that it is "a trust not for their own, but for the public benefit." Hence, it is a settled principle of parliamentary law, that, a member cannot relinquish or resign his seat as such. But, as certain offices under the crown are declared by law to be incompatible with a seat in the house of commons, and members accepting them

subsequently resigned his seat, and the subject does not appear to have been again agitated.[1]

[The question was probably considered by Mr. Gore, to have been settled by the vote above stated.]

thereby vacate their seats, this provision of law has been made use of, and is constantly resorted to, in order to enable members to evade the parliamentary restriction as to resignation. Two or three offices, which are now merely nominal in their character, are appropriated by the government for this purpose. Whenever a member of the house of commons, of whatever party, wishes to relinquish his seat, he applies to the proper department of government for an appointment to one of these offices; which being conferred upon him (and they are seldom or never refused) his seat in parliament is thereby vacated. The object of the appointment being thus effected, the office is immediately resigned. The offices usually conferred for this purpose are those of steward or bailiff of the three Chiltern Hundreds, Stoke, Desborough, and Bonenham, or of the manors of East Hendred and Northstead.

In 1826, the poet Southey, who had been elected a member for Downton, during his absence on the continent, availed himself of the provision of law mentioned in a note on a preceding page, requiring members to possess a certain amount of property, in order to avoid serving as a member. He addressed a letter to the speaker, in which he stated, that he did not possess the estate required by law to qualify him as a member; and the house thereupon, after waiting the proper time, issued a writ for a new election.

In this country, it is probably true, that every person, elected a member of a legislative assembly, may decline the office; but if he accepts, and takes his seat, it may be doubted, whether he can resign without the consent of the body of which he is a member.

[1] 10 J. H. 207.

1790—1791.

YORK.

The office of judge of the district court of the United States, is incompatible with that of representative in the legislature of this commonwealth.

The Hon. David Sewall, judge of the district court for the district of Maine, appearing to take his seat as a member from the town of York; on motion, it was ordered, that a time be assigned for considering the validity of his election, and that he be heard on the subject. The house having considered the subject, at the time assigned, it was made a question, whether

Mr. Sewall, being a judge of the district court of the United States, has a right, by the constitution of this commonwealth, to a seat in this house? and being taken by yeas and nays, it was decided in the negative, 5 yeas and 111 nays. A precept was then ordered to the town of York for a new election.[1] [See the eighth article of the amendments to the constitution, which provides, that "no person holding any office under the authority of the United States, (postmasters excepted) shall, at the same time, hold the office of governor, lieutenant-governor, or counsellor, or have a seat in the senate, or house of representatives of this commonwealth."]

DANVERS.

Notice of town-meeting.—Proceedings in same.—Question as to their regularity.

The election of the member returned from the town of Danvers was called in question, by Daniel Prince and others of that town, for the following reasons, stated in their petition: that "the notice for the meeting, at which the election took place, was posted up not more than twenty-nine hours before the time appointed, upwards of fourteen hours of which was holy time, and six hours of the night following being necessarily spent in sleep, some of the inhabitants had only six hours notice, and others none at all, of the time appointed for the meeting; whereas, the almost invariable custom of the town has been to have the notices of meetings for such purposes posted up at the meeting-house, two sabbath days previous to the time appointed; and, that at the time, when the few, who had notice, were assembled, a number of young people had also assembled in the galleries, for the purpose of singing, in which they were engaged, together with one of the selectmen, while the voters were carrying in their votes for a representative, notwithstanding repeated request made to the other selectmen to call the meeting to order." The petitioners, upon

[1] 11 J. H. 172, 175.

the verbal report of the committee to whom it was referred, had leave to withdraw their petition.[1]

WESTMINSTER.

Where a meeting for the choice of a representative was held under a warrant containing only one article, namely, "to chose a representative," it was held, that the town had no authority to vote not to send a representative, and that an election after such a vote was valid. [But see the opinions of the justices of the supreme judicial court, 1810—11, and 1815—16.]

The election of Josiah Puffer, returned a member from the town of Westminster, was controverted by Abner Holden and others, of that town,[2] upon the following facts, stated in a certificate of the town clerk, accompanying their petition, namely, that the warrant for calling the meeting contained only one article: "To chose a representative;" but that at the meeting for the election, it was made a question, whether the town would send a representative or not, and the vote being put, it was declared by Mr. Puffer, who as one of the selectmen presided at the meeting, to be decided in the affirmative. The vote being disputed, the meeting was divided, and it was again declared in the affirmative, and the inhabitants were requetsed to bring in their votes for a representative. The vote was disputed a third time, and the meeting being again divided, and the votes counted by the moderator, he said "they have got the vote not to send, but I have declared it to be a vote to send, and therefore bring in your votes." The votes were then cast, and Mr. Puffer had twenty-one and two other persons one each. Mr. Puffer then declared himself chosen a representative.

The petition and other documents were referred to Messrs. *Parsons*, *Henshaw*, *Sewall*, *Bowdoin*, and *Holmes*, who subsequently reported, as their opinion, "that the proceedings of the town meeting, at which the member is said to have been elected, were irregular and illegal, and that therefore his seat

[1] 11 J. H. 43, 49. [2] Same, 13.

in the house ought to be vacated:" which report, being read and debated, the question was put whether the house would agree to the same, and was determined in the negative.[1]

[The election of Mr. Puffer was supported by Joseph Miller and others, in a memorial, in which they alleged, that, as there was no article in the warrant, for determining whether the town would or would not be represented, no vote could be legally taken on that question. The memorialists also asserted, that "the principle held out and acted upon, that every town has a right to vote they will not send a member to the general court, strikes at the very nerves of the constitution, and throws the people into anarchy at once." At this period, the house rigorously exercised the power, conferred upon it by the constitution, (chap. i., sec. iii., art. ii.) of imposing fines upon such towns as neglected to chose and return members agreeably to it sprovisions; and it was quite natural, therefore, that it should be thought unconstitutional, to pass a solemn vote not to do what the constitution seemed to require, and what a town would be liable to punishment for not doing. It may perhaps be for the reason suggested by the memorialists, that the house thought proper to reject the report of the committee. It is now settled, both by the opinion of the supreme judicial court, and by decisions of the house, that towns have a right, *in their corporate capacity*, to determine whether they will be represented or not.[2]]

[1] 11 J. H. 26.

[2] See the opinions of the court in the years 1810—11, and 1815—16.

1791—1792.

MEMBERS HOLDING OFFICES UNDER THE UNITED STATES.

Upon a question, whether a member, who held the office of deputy marshal of the district of Massachusetts, under the government of the United States, was not thereby disqualified to hold his seat, the house ordered the subject to subside.

A COMMITTEE was appointed to consider "whether there be in the house any person returned as a member and who has taken his seat, who is an officer under the federal government, holding an office similar to any office under this government, whose office renders him incompatible with a seat in the legislature of this commonwealth; and also, whether there are any persons returned as members of the house, who hold offices declared by the constitution to be incompatible with the holding of a seat in this house."[1]

The committee reported, that Aaron Brown, who was returned a member from the town of Groton, and had taken his seat, was an officer under the authority of the federal government, and executed the office of deputy marshal of the district of Massachusetts, which is analagous to that of a deputy sheriff, in and under the authority of this government:[2] and the report having been considered by the house, it was ordered that the subject subside.[3]

BARNSTABLE.

[The papers in this case are missing from the files.]

[1] 12 J. H. 19. [2] Same, 42. [3] Same, 45.

1792—1793.

MEMBERS OF CONGRESS.

Members elect of congress are not thereby disqualified to hold seats as members of the legislature in this commonwealth.

The house went into a committee of the whole, on the subject of the constitutionality and expediency of members of congress elect holding a seat. The committee reported, that, in their opinion, the question should not be gone into of the expediency of members elect holding a seat: and, on the question, whether members of congress elect were constitutionally disqualified, it passed in the negative.

On the question of the acceptance of this report, it passed in the affirmative, seventy-five out of one hundred and fifteen members present, being in favor of its acceptance.[1] [By the eighth article of the amendments to the constitution, it is now provided, that no senator or representative shall continue to hold his office as such, after being elected a member of the congress of the United States, and accepting that trust; but the acceptance of such trust shall be taken and deemed to be a resignation of his said office.]

SHREWSBURY.

[The papers in this case are not to be found on the files.]

[1] 13 J. H. 357.

1793—1794.

[No cases.]

1794—1795.

WATERTOWN.

Eligibility of a member, who had been impeached for corrupt and wilful misconduct as a magistrate, and found guilty.

The election of William Hunt, returned a member from the town of Watertown, was controverted by Richard Clark and others, on the ground, that the meeting at which he was elected was not duly notified, and also, that persons were illegally admitted to vote in the election. The petition,[1] and also a memorial of Marshall Spring and others,[2] in favor of the member, were referred to a committee of five, who made a report,[3] declaring that his seat ought to be vacated, which report was rejected. The petitioners presented a second petition,[4] in which they reiterated the charges contained in the former, and alleged further, that Mr. Hunt was not eligible as a member, "by reason of the public censure passed upon him at the last session of the general court, wherein he was impeached for corrupt and wilful misconduct as a magistrate, and found guilty."

This second petition was referred to Messrs. *Bancroft*, *Ely*, and *Bodman*, who made a report,[5] requesting a decision of the question, whether a summons should issue, to bring witnesses on a subject already determined by the house:[6] and the question being taken, it passed in the negative. It was then moved, that the petitioners have leave to withdraw their petition, which motion was taken by yeas and nays, and determined in the negative, yeas 44, nays 50. The petition was then recommitted, and Messrs. *Carr* and *Sproat* were added to the committee. The vote on the subject of summoning witnesses was thereupon reconsidered, and the clerk was directed to issue a summons accordingly.

[1] 15 J. H. 17. [2] Same, 24. [3] Same, 41. [4] Same, 101. [5] Same, 108.

[6] Probably alluding to the charges upon which Mr. Hunt had been impeached and declared guilty the year before.

The committee subsequently reported an order of notice to the town of Watertown, to appear on the first Tuesday of the next session, (if they should see cause,) to contest the allegations contained in the petition: which report was agreed to and the order passed.[1] [It does not appear that any further proceedings were had in the case, or that either party came forward at the next session.]

[1] 15 J. H. 110.

1795—1796.

1796—1797.

[No cases.]

1797—1798.

[The election in Waltham was petitioned against, but the petition was wholly unsupported by evidence.]

1798—1799.

[No cases.]

1799—1800.

[The election in Medfield appears to have been controverted. The papers in the case are missing.]

1800—1801.

HARWICH.

Selectmen, after an adjournment of a town-meeting, may change the place for holding the adjourned meeting.

Two members claiming the same seat having been returned by separate returns, each of which purported to be made by a distinct set of selectmen, both were restrained from voting until their respective claims should be determined.

Two returns were received from the town of Harwich, certified by two different sets of selectmen, by one of which, Ebenezer Broadbrooks, Jr., and John Dillingham, and by the other, Solomon Freeman and John Snow, were returned as the representatives from that town.

The committee on the returns, to whom also were committed sundry documents relative to the election in Harwich, made a preliminary report, upon which, the members returned were restrained from voting until their respective claims to a seat should be determined.[1]

By the papers on file, it appears, that, at the annual town-meeting of the town of Harwich, held at the north parish meeting-house therein, on Wednesday, the nineteenth of March previous, for the choice of town officers, three selectmen and a town clerk were chosen, together with some other town officers, and the meeting was then adjourned to Satur-

[1] 21 J. H. 16.

day, the twenty-second day of March, to meet at the same place. On the twenty-second, the meeting was again adjourned, as before, to Friday the twenty-eighth. On the twenty-third (Sunday) a notice was posted up by the town clerk, on the north parish meeting-house, stating, that, by order of the selectmen, chosen as above, the meeting to be holden by adjournment, on the twenty-eighth, would be holden at the meeting-house in the south parish, in Harwich.[1] On the twenty-eighth, several of the inhabitants, denying the right of the selectmen to change the place of the meeting to the south parish, met at the north parish meeting-house, and chose four additional selectmen, who afterwards called a meeting for the choice of representatives, at which Freeman and Snow were elected. A meeting was held, pursuant to the notice given by the selectmen first chosen, at the south parish meeting-house. The selectmen chosen on the nineteenth of March called a meeting for the choice of representatives, at the south parish meeting-house, at which Broadbrooks and Dillingham were chosen.

The committee, upon these facts reported, that the election of Broadbrooks and Dillingham was legal, and that of Freeman and Snow illegal, and their report was agreed to.[2]

SULLIVAN.

A judge of probate, having been elected a representative, and resigned his office of judge, after the commencement of the session, was held to be entitled thereby to take his seat as a member.

The committee on elections, having been directed to consider the return of a member from the town of Sullivan, reported,

[1] By st. 1785, c. 75, which was in force when this case was decided, selectmen had authority, (§§ 2, 5) in their warrant, for a town-meeting, to fix upon the place of meeting, which was only required to be in the same town. The Rev. Sts. c. 15, §§ 19, 21, contain similar provisions. By the latter, § 25, a town-meeting may be adjourned to such place, within the same town, as the meeting shall determine. But there was not in the statute of 1785, nor is there in the Rev. Sts., any express provision for a change of the place of meeting, after an adjournment, by the authority of the selectmen alone.

[2] 21 J. H. 36, 56.

"that Paul Dudley Sargeant, the member returned, has resigned his office of judge of probate for the county of Hancock, and his resignation has been accepted, since the present session of the legislature, and they are therefore of opinion that he is entitled to take his seat." The report was agreed to.[1]

LUDLOW.

A member, who had been convicted of forgery, and sentenced to pay a fine therefor, ten years previous to his election, but had not been pardoned, or procured a reversal of the judgment, was excluded from his seat.

THE committee on elections, who were directed to consider the return from Ludlow,[2] reported, that at the supreme judicial court, held at Northampton, in April, 1791, Elisha Fuller, of Ludlow, trader, was indicted for forging a certificate, purporting to be a certificate, signed by two of the selectmen of that town, whereby they recommended the said Fuller, as a person of sober life and conversation, and well qualified for the business of a retailer of spirituous liquors, and for offering and publishing the same, at a court of general sessions of the peace, held at Northampton, in September, 1790, as a true and genuine certificate, in order to obtain a license for retailing; and that at the supreme judicial court held at Northampton, in the month of May following, the said Fuller, upon a legal trial, was found guilty of the charges in the said indictment, and sentenced to pay a fine of thirty pounds and costs; that said Fuller is the same person, who is returned a member from the town of Ludlow; and that the said sentence remains unreversed, and in no wise quashed or set aside, and said offence in no wise forgiven or pardoned.

[1] 21 J. H. 49, 84. The constitution, part ii. chap. vi., act ii., under which this decision was made, declares that no person, holding the office (among others) of judge of probate, shall, at the same time, have a seat in the senate, or house of representatives. This article is not superseded by the eighth article of amendment.

[2] 21 J. H. 18.

It was therefore voted, that Elisha Fuller, the member returned from Ludlow, should be excluded from a seat.[1]

[1] 21 J. H. 57, 58.

1801—1802.

[No. cases.]

1802—1803.

FRYEBURGH.

An election having taken place at a meeting, previous to which the selectmen held no session for examining the qualifications of voters, as required by st. 1800, c. 74, § 1, and at which they exhibited no list of votes; the election was held valid.

The election of the Rev. William Fessenden, returned a member from the town of Fryeburgh, was controverted by sundry inhabitants of that town, for the following reasons, stated and sworn to in their memorial, namely, that the selectmen gave no notice of any time and place, that they would be in session, previous to the meeting, to examine the qualifications of voters, and were not in fact in session for that purpose; and that at the election, they did not exhibit any list of voters, but suffered the votes to be brought in promiscuously, disorderly, and confusedly.[1]

This memorial was committed to the committee on the returns, who reported generally that they were all legal, which report was agreed to.[2]

[1] 23 J. H. 18. [2] Same, 34.

[The first section of st. 1800, c. 74, which was in force when this case was decided, required the assessors, on or before the first of March, annually, to make out and deliver to the selectmen, a list of such inhabitants as appeared to them to be entitled to vote. This list was to be revised and corrected within ten days by the town or district, and was then to be published by the selectmen, by posting up copies thereof, in two or more public places, fourteen days before the first Monday in April. It was also made the duty of the selectmen or assessors to be in session at some convenient place immediately preceding any meeting for the choice of governor, &c., for so long a time as they should judge necessary, to receive evidence of the qualifications of persons whose names had not been entered on the list. They were also required, at the time of the publication of the list, to give public notice of the time and place of such meeting. The first section of this statute was repealed, and its provisions reënacted with some important modifications, by st. 1802, c. 116.

It will be perceived, that the st. of 1800, c. 74, made it the duty of the selectmen *or* assessors to hold a session, previous to a meeting for an election, to revise and correct the list; but the memorial only alleges, that the *selectmen* held no such session; and for anything that appears in the case, the assessors might have acted in the matter. The other ground of objection was, that the selectmen exhibited no list of voters at the meeting; but this was not required by the statute. The facts alleged, therefore, if proved, were clearly not sufficient to invalidate the election.]

TOPSHAM.

The selectmen of a town having issued a warrant for a meeting for the transaction of certain town business, and also for the choice of a representative, and the same having been served according to its direction; one of the selectmen, afterwards, and before the meeting, with the assent of another, inserted a new article in the warrant, previous to the article for the choice of representative, "to see if the town would send a representative;" a meeting was held accordingly, at which it was voted not to send, and the town refused to reconsider that vote; the selectmen then called upon the inhabitants to bring in their votes for representative; several brought in their votes accordingly; some refused to do so; others withdrew from the meeting; and on the third balloting an election was effected. It was held, that the election was valid. [But see the opinions of the justices of the supreme judicial court in 1810—11, and 1815—16.]

THE election of Jonathan Ellis, returned a member from the town of Topsham, was controverted by John Rodgers and others, a committee appointed by the town for that purpose, upon the following facts, which appear from the memorial, depositions, and copies of the proceedings on file:—

The selectmen of said town made their warrant, for a town-meeting to be held therein, on the third day of May, for the transaction of certain town business, which appears to have been adjourned from a previous meeting, and also for the election of a representative. The warrant was committed to a constable, who pursued its directions in due form. A few days previous to the meeting, and after the inhabitants had been notified of it, one of the selectmen, with the assent of another, interlined an article in the warrant, previous to the article for the choice of a representative, in the following words, viz: "To see if the town would send a representative to the general court the present year," and also made some other slight verbal alterations. A meeting was held, agreeably to the notice, and, after choosing a moderator, the town voted not to send a representative. The other subjects contained in the warrant were then disposed of, and the meeting was declared by the moderator, as testified to, by some of the deponents, to be dissolved. Two of the collectors then came forward and had some of the taxes on their lists abated by the

selectmen, as sworn to in some of the depositions, but by a vote of the town, as appears by a copy of the proceedings of the meeting certified by the town clerk. Several of the voters had at this time left the meeting, supposing the business to have been completed. A motion was then made, seconded, and put, to reconsider the vote not to send a representative, and was decided in the negative. One of the selectmen then called upon the voters to bring in their votes for a representative. Several of the inhabitants brought in their votes accordingly; some refused to do so; and others withdrew from the meeting. The votes were received by the selectmen, and, upon the third balloting, Jonathan Ellis was declared to be elected.

Several of the inhabitants, deeming the proceedings to be improper, petitioned the selectmen to call a town-meeting to consider the subject, and a meeting being convened accordingly, the above mentioned committee was appointed to petition against and to controvert the election as illegal.

The memorial was presented at the June session,[1] and referred to Messrs. *Montague*, *Norton*, and *Ely*, who reported a reference of the subject to the next session.[2]

At the January session, the memorial was again taken up and referred to Messrs. *Ely*, *Foster*, and *Upham*,[3] who made the following report thereon:—

That, having heard the parties and attended to the evidence, they were of opinion, that the meeting, at which Ellis was elected, was legally warned;—that the selectmen, at said meeting, received and counted the votes;—that they declared the said Ellis duly chosen;—that they made a certificate thereof to the house;—and, that, on the whole, notwithstanding some irregularities in the proceedings of the meeting, the choice was legal. The report was agreed to.[4]

[1] 23 J. H. 93. [2] Same, 101. [3] Same, 213. [4] Same, 247.

1803—1804.

COMMITTEE ON ELECTIONS.[1]

Messrs. *Henry Knox*, of Thomastown, *William Smith*, of Boston, *Laban Wheaton*, of Norton, *Jonathan L. Austin*, of Cambridge, *Thomas G. Thornton*, of Pepperellborough.

PARIS.

Where an election was effected at a meeting, which was irregularly notified, and held at an inconvenient hour, and at which no list of voters was produced; it was held, that such election was nevertheless valid.

The election of Josiah Bisco, returned a member from the town of Paris, was controverted by David Andrews and others, of that town, for the following reasons, stated in their petition, namely: that the notification set up by the constable had no manner of date to it; that it was set up in a school-house, and was under lock and key, except on Sundays; that there was no list of voters produced at the meeting, although repeatedly called for, the selectmen declaring that there was none; and finally, that as the town of Paris is very large, and the roads bad and miry, and the meeting was set at 3 o'clock in the afternoon, many of the inhabitants could not with safety attend and get home the same day.[2]

The committee reported, that the petitioners have leave to withdraw, which was agreed to.[3]

[The act of 1800, c. 74, the first section of which provided, that a list of voters should be furnished to the selectmen and

[1] From this time, a committee on elections was regularly appointed, at the commencement of the political year, as one of the standing committees of the house.

[2] 24 J. H. 23. [3] Same, 27.

kept by them, was repealed on the 7th of March, 1803, by the statute of 1802, c. 116, and the modified provisions of the latter statute substituted for the former. The statute of 1802, which first made it the duty of the selectmen to be provided with and have a complete list at every election, required the list to be made out and furnished to the selectmen on or before the first day of March annually; but as this statute was not passed until the 7th of March, 1803, it must have remained inoperative, so far as it related to the list, until the next year, unless its provisions were to be considered as a continuation of those of the former act. It is at least, doubtful, therefore, whether, at the elections for representative in May, 1803, there was any law in force requiring selectmen either to be provided with or to produce a list of voters.]

SHEFFIELD AND MOUNT WASHINGTON.

Election controverted by the selectmen, by whom the return was signed, on the ground, that they had since discovered that illegal voters, sufficient in number to render the election void, had voted therein.

THE election of Moses Hubbard, returned a member from the town of Sheffield, and district of Mt. Washington, was controverted by the selectmen of Sheffield,[1] who stated in their petition, that since the election, they had discovered, that at least three persons voted therein,[2] who were not qualified, and that at the election, the whole number of votes given in was two hundred and seventy-one, of which Moses Hubbard had one hundred and thirty-seven, John W. Hurlbert, one hundred and twenty-seven, and seven were scattering. By a memorandum on the back of the petition, it appears that the election was conceded to be illegal by the member returned, and the committee made a report accordingly, which was agreed to.[3]

[1] 24 J. H. 31.

[2] The illegal votes must all have been given for the sitting member, or the election would not have been affected. It does not appear by the papers in the case, for whom these votes were given.

[3] 24 J. H. 55.

CASE OF JONATHAN L. AUSTIN, MEMBER FROM CAMBRIDGE.

The office of commissioner of bankrupts, under the first bankrupt law of the United States (act of 1800, c. 19), was held not to be incompatible with that of representative.

A COMMITTEE was appointed, at the June session, to inquire whether any member then held a commission under the president of the United States, and if so, whether it was incompatible with his right to a seat.[1]

The committee reported, that Jonathan L. Austin, a member from the town of Cambridge, held the office of commissioner of bankrupts, under the United States, which is an office held at the pleasure of the president, and that having examined the constitution of this commonwealth, they are of opinion, that the said office is not incompatible with that of a representative.

The question upon the adoption of this report was taken by yeas and nays and decided in the affirmative, 82 yeas, and 15 nays.[2]

[1] 24 J. H. 95. [2] Same, 130, 131.

1804—1805.

NATICK.

[The papers in this case are missing from the files.]

1805—1806.

COMMITTEE ON ELECTIONS.

Messrs. *Laban Wheaton*, of Norton, *Perez Morton*, of Dorchester, *David Payson*, of Wiscasset, *Edward Bangs*, of Worcester, *Eliakim Phelps*, of Belchertown.

REHOBOTH.

On a petition against an election, alleging irregular proceedings at the meeting at which it took place, the case was postponed, and a commissioner appointed to take depositions in the mean time, at the request of either of the parties.

The election of David Perry, Jr., returned a member from Rehoboth, was called in question by Robert Dagget and others, for the following reasons, stated in their petition:—

1. That the selectmen, at the meeting for the election, received votes from persons under the age of twenty-one;

2. That the presiding selectman took votes out of the box, and in lieu thereof, put into the box votes for a different candidate, and also, while counting the votes, picked up votes from the seat and had them counted; and,

3. That after the box was turned, the votes sorted and counted, and the numbers ascertained, the selectmen suspended a declaration thereof, and received and counted other votes.

This petition was presented at the June session, and referred to the committee on elections,[1] who reported a postponement of the consideration thereof, to the third Wednesday of the session, and an order appointing Samuel Morey, Esq., to take depositions, in the mean time, at the request of either party.[2]

[1] 26 J. H. 20. [2] Same, 29.

The report was agreed to, and several depositions were taken, in pursuance of the order, tending to substantiate the charges contained in the petition.

The committee subsequently reported a reference of the subject to the next session, which was agreed to.[1]

DANVERS.

The number of representatives which a town might constitutionally send, before the adoption of the twelfth and thirteenth articles of amendment, was to be determined by the number of ratable polls therein (being free male inhabitants, of sixteen years of age and upwards, not exempted by law from taxation) at the time of any election.

The election of Gideon Foster, Samuel Page, and Nathan Felton, returned as members from the town of Danvers, was controverted by Aaron Putnam and others, on the ground, that the town did not contain a sufficient number of ratable polls, to entitle it to send three representatives.[2]

The committee on elections reported the following statement of facts[3] in this case:—

1. It appears, that, at the time of the election of the sitting members, the town of Danvers assessed a poll tax on five hundred and seventy-eight polls;

2. It appears, by a certificate from the assessors of Danvers, that, in addition to the polls rated as above, seventy-three other persons were abated of their poll tax, on account of old age, infirmity, &c.; and

3. It appears, by the resolution, which passed the legislature, at the time of the last valuation, fixing the number of ratable polls of the several towns, that the town of Danvers was fixed at six hundred and three.

The committee, upon this statement of facts, requested the house to determine the following questions resulting therefrom, as well for the general government of the committee in other cases, as to determine the present case:—

[1] 26 J. H. 92. [2] Same, 20. [3] Same, 29.

1. Is the constitutional number of polls, on which any town is entitled to calculate its right of representation, the number of polls actually taxed therein at the time of the election?

2. Or is the number abated to constitute a part of the constitutional number of ratable polls?

3. Is the number of polls, fixed against each town, at the time of a general valuation, and by which it is uniformly taxed to the commonwealth, the fixed standard of its representation during the same period?

A time was assigned for the consideration of this report, and after deliberation thereupon, it was

"Resolved, That it is the sense of the house, that the extent of the right of representation, as given to the towns and districts of the commonwealth, by the constitution thereof, is to be regulated by the number of ratable polls, actually existing in the towns and districts to be represented, at the time of any election; and

Resolved, That, in the number of ratable polls, mentioned in the constitution, as a rule, by which to determine the extent of the right of representation, was intended to be included the whole number of free male inhabitants of the age of sixteen years and upwards, who are not by law exempted from taxation."

The town of Danvers, according to this decision, containing six hundred and fifty-one ratable polls, the election therein was confirmed.[1]

[1] 26 J. H. 31, 33.

BATH.

The petitioners against an election having alleged that the same was void, on the ground, that the member returned did not receive a majority of the votes, and that the selectmen retired by themselves to sort and count the same; and it appearing in evidence, (which was not alleged in the petition) that there was no list of voters produced at the meeting, and that the selectmen, after receiving the votes, retired into the pulpit of the meeting-house in which the election was held, and, with the town clerk, there sorted and counted the votes; but it did not appear, that the votes were given in, as set forth in the petition; it was held, that the election was good.

The election of William King, returned a member from the town of Bath, was controverted by David Trufant and others, on the following grounds, stated in their petition[1]:—

1. That at the meeting for the choice of a representative, after the selectmen had received and counted the votes, they declared the whole number to be one hundred and fifty-one, seventy-six of which were necessary to a choice, and that William King had that number and was chosen, whereas there were seventy-five votes given in for Samuel Davis, and one for William Webb; and

2. That the selectmen, instead of sorting and counting the votes openly, in the presence of the meeting, as required by the statute of 1795, c. 55. s. 1., retired by themselves to sort and count the same.

The petition was accompanied by depositions, from which it appeared, that the right of one person, who voted in the election, was disputed, and who, upon a subsequent inspection of the tax list, was found not to be taxed for any property; that there was no list of voters produced at the meeting; and that the selectmen, after receiving the votes, retired into the pulpit of the meeting-house, in which the meeting was held, and there, together with the town clerk, privately sorted and counted them; but it did not appear that the votes were given in as stated in the first allegation in the remonstrance.

It appeared, on the other hand, by the affidavits of the selectmen, that the votes were as declared by them at the meet-

[1] 26 J. H. 21.

ing, and by the affidavit of the town clerk, who counted the votes for Mr. King, that he had seventy-six. The selectmen further testified, that they neither saw nor knew of any votes for any other person or persons, than Samuel Davis and William King.

The committee on elections reported, that the election was void:[1] but on the question, whether their report should be agreed to, it was determined in the negative.[2]

FRANKLIN.

Meetings for the transaction of town business, and for the choice of a representative, being notified and held on the same day; the moderator of the town-meeting and the selectmen presided alternately, as questions were brought forward, relating to town business, or to the choice of a representative:—It was held, that the election was not invalidated.

THE election of Peletiah Fisher, returned a member from the town of Franklin, was controverted by Samuel Metcalf and others. The facts in the case appear from the following statement reported by the committee on elections:—

"That the town-meeting in that town, for the choice of a representative for the present year, had been legally and regularly warned, and was holden on the sixth day of May last.

That in addition to the warning for choosing a representative, a number of articles, relating to town affairs, were inserted in the same warrant; that it had been an invariable usage in that town, since its first incorporation, so to do; and that in this instance, there was one inserted among those relating to town affairs, for giving instructions to their representatives.

That the hour appointed in the warrant, for choosing a representative, was eleven of the clock in the forenoon.

That for the purpose of considering and acting upon the other articles contained in the warrant, the people were, agreeably thereto, notified to convene, and actually did convene, at nine of the clock in the forenoon of the same day.

[1] 26 J. H. 40. [2] Same, 42.

That being so convened, they attended to the first article contained in the warrant, which was to choose a moderator, and having done this, they proceeded to consider some of the other articles relating to town affairs.

That when the hour of eleven had arrived, without any formality of adjourning or postponing the town business, the moderator retired, and the selectmen took his place and presided, and having read over a list of voters for representative, called for the votes to be brought in; upon which a motion was made not to choose one, and the question being taken passed in the affirmative, 72 to 67; after which it was observed, that 'they had nothing further to do.' Then the selectmen, with as little formality, as the moderator had done before, left their seats, and he resumed his station. The meeting was then adjourned for an hour. When the hour had elapsed and the people had reassembled, they proceeded to act on those articles contained in the warrant, which had not been acted upon before.

That in the midst of this business, a motion was made to reconsider the vote, that had been passed in the forenoon, not to choose a representative, and then to choose one. Upon which the moderator instantly quitting his station, the selectmen again presided, and the question being taken, passed in the affirmative, 82 appearing in favor of it. A vote was then passed to postpone the choice to the Thursday of the then next week. After this the moderator again took his stand, and there being no article remaining not acted upon, among those relating to town affairs, excepting the one to give instructions to the representative, the meeting was adjourned to that time. At which time, being the 16th day of May, and within the time provided by the constitution, the people again assembled, and having voted to adjourn the consideration of the only remaining article, contained in the warrant, among those relating to town affairs, which was to give instructions to their representative, for the space of one hour, the moderator left his place, and the selectmen presided and called the attention of the voters to the article for choosing a representative.

A motion was then made to reconsider the last vote, passed on that subject, and adhere to the first, which was decided by dividing the house, 62 being in favor of it, and 92 against it. The selectmen then called for the votes for a representative, which, after several trials, being sorted and counted, produced the final result, as appears by the record herewith exhibited, that 67 votes making a choice, Peletiah Fisher, Esq., having 83, was declared to be chosen. After which, the moderator again took his stand, and the remaining article in the warrant was acted upon, which was to give their representative such instructions as the town should think proper.

That when the vote passed, not to send a representative, there were 139 voters present, who acted on that question. At the meeting when the choice was finally made, the vote being again put, whether they would send a representative, or not, there were 154 voters present, who acted on the question.

That two or three legal voters for a representative absented themselves from the last meeting, who were present at the first, not because they were ignorant of the time to which the meeting stood adjourned, but because, as they said, it was their opinion that the proceedings were illegal."

On these facts, the committee gave no opinion, but submitted the question, whether the election of Peletiah Fisher was valid or not. There is no entry on the journal of any further proceedings; but a memorandum, on the back of the report, states, that the subject was referred from the May to the January session, and a time assigned for its consideration. Mr. Fisher retained his seat.

1806—1807.

COMMITTEE ON ELECTIONS.

Messrs. *Edward Bangs*, of Worcester, *Laban Wheaton*, of Norton, *Ezekiel Bacon*, of Williamstown, *Edward St. Loe Livermore*, of Newburyport, *Samuel H. Wheeler*, of Lanesborough and New Ashford.

SANFORD AND ALFRED.

Where it appeared, that the member elected had furnished numbers of the electors, both before and after the election, with refreshments of victuals and drink, at his own expense, the election was not thereby invalidated.

The office of deputy postmaster is not incompatible with that of representative.

The election of Thomas Keeler, returned a member from the town of Sandford and district of Alfred, was objected to by John Sayward and others, who, in their memorial,[1] alleged:

1. That Keeler, with a view to influence and corrupt the electors, did agree and contract with one Ebenezer Sayward, an innholder in Alfred, to furnish them with refreshments of victuals and drink, on the day of election, at his expense; and that refreshment was accordingly furnished them by Sayward, and Keeler paid the bill;

2. That Keeler also made a similar agreement with one Paul Webber, and paid him for provisions furnished the electors and their horses, on the day of election;

3. That the meeting was tumultuous and disorderly, and conducted with an unusual and unpardonable degree of spirit and acrimony, probably from the cause above mentioned;

4. That after the election, Keeler gave a public invitation to all the electors, to go to any or all of the public houses or

[1] 27 J. H. 31.

stores in Alfred, or to his own house in Sandford, to receive such refreshments as they should want, at his expense, and that for refreshment so furnished, (except what was furnished at Keeler's own house and store) Keeler and his colleague paid more than fifty dollars;

5. That, on the evening of the election, there was every appearance of riot and drunkenness, at Keeler's store, among the electors, and fighting and quarrelling were prevalent among them; and

6. That Keeler was a deputy postmaster and had no assistant in that office.[1]

This memorial was accompanied by sundry depositions, from which it appeared, that Keeler and his colleague had treated numbers of the voters, at considerable expense, both before and after the election.

The committee on elections reported, that having attended to the memorial, and to the depositions taken by the petitioners, to prove the charges therein contained, they were unanimously of opinion, that Thomas Keeler, the sitting member, was duly elected, and that nothing appears to prevent him from holding his seat. The report was agreed to.[2]

TROY.

Where two members were returned, claiming a right to the same seat, both were enjoined not to vote or debate until the validity of their elections should be determined.

Where a town had been accustomed to elect town officers in April, and a number of the inhabitants petitioned the selectmen to call the annual town-meeting in March, and the selectmen called a meeting for the purpose of considering the expediency of changing the time of choosing town officers from April to March, which meeting, by reason of the confusion and disturbance therein, was not organized;—this was not such an unreasonable refusal to call a meeting, as would authorize a justice of the peace to call and organize a meeting for the choice of town officers;—and the election of a representative, at a meeting called by selectmen so chosen, was held void.

The election of Charles Durfee, returned a member from the town of Troy, was controverted by Nathan Bowen and others,

[1] See the eighth article of amendment to the constitution. [2] 27 J. H. 66.

as illegal, and his seat claimed for Jonathan Brownell, who was alleged to have been duly elected a representative for the said town;[1] and it was ordered, that the two members, returned from Troy, be enjoined neither to vote nor debate, until the legality of their elections should be determined.[2]

From the memorial and depositions subsequently taken by both parties,[3] the following appear to be the facts in the case:

The town of Troy, until within a few years, had been a part of the town of Freetown, in which it was the custom to choose town officers on the first Monday of April; and the town of Troy, since its incorporation, had continued in the same practice, until the present year, when a number of their inhabitants, petitioned the selectmen to call a meeting for the choice of town officers in the month of March. The selectmen thereupon issued a warrant for a town-meeting on the eighth of March, not for the purpose of choosing town officers, but to consider the expediency of changing the time of choosing them from April to March. A meeting was held accordingly, on the eighth of March, at which the disorder and confusion were so great, that, after two trials for the choice of moderator, it was found impracticable to organize the meeting, and nothing was done, except, that by a general consent, it was agreed, that the selectmen should call a meeting on the seventeenth of March, for the same purpose. The selectmen issued a warrant for a meeting at that time, and delivered the same to a constable for service. Several of the inhabitants who had signed the petition for the first meeting in March, then petitioned Charles Durfee, a justice of the peace, to issue his warrant, for a meeting of the inhabitants, to be held at the same time and place appointed in the warrant issued by the selectmen, alleging, as the ground of their request, that the selectmen had unreasonably refused to call a meeting on the eighth of March, agreeably to their petition. Durfee issued his warrant accordingly, and directed and delivered it to the same constable to whom the selectmen had delivered theirs. On the seventeenth of March, the selectmen attended, at the time and place

[1] 27 J. H. 42. [2] Same, 45. [3] Same, 78.

appointed for their meeting, and demanded a return of the warrant issued by them, of the constable, who refused to return the same. Durfee also attended, and in pursuance of the warrant issued by him, which had been returned by the constable, proceeded to open and organize the meeting. A moderator having been chosen, the meeting then proceeded to the choice of officers. The selectmen, whose warrant had not been returned, then issued another warrant, for a meeting on the first of April, for the choice of town officers, and a meeting was held accordingly, at which those of the inhabitants, who had previously acted under Durfee's warrant, cooperated in the choice of moderator, but being disappointed in the result, they then withdrew. At this meeting, town officers were chosen. The selectmen, chosen at the meeting held in pursuance of Durfee's warrant, called a meeting for the choice of a representative, at which meeting, Charles Durfee was elected. The selectmen, chosen at the meeting called by the old selectmen, on the first of April, also called a meeting for the choice of a representative, at which Jonathan Brownell was elected.

The committee on elections reported,[1] that, having taken into consideration the petition aforesaid, and also the circumstance, that two members are returned from the town of Troy, claiming seats under certificates from two real or pretended sets of selectmen, they were of opinion that Charles Durfee was not duly elected, and ought not to have a seat, and that Jonathan Brownell was duly elected, and ought to take his seat accordingly. The report was agreed to.

ATTLEBOROUGH.

[The election in Attleborough was controverted on the ground that certain persons were admitted to vote, who had no legal right: the committee reported merely that the member was duly elected.]

[1] 27 J. H. 136.

HARVARD.

A town having a right to send two representatives, at a meeting called to elect a person to represent the inhabitants in the general court, elected a member, and then voted to choose another, and thereupon elected a second; the election of the latter was held good.

The election of Jonathan Wetherbee, returned a member from the town of Harvard, which was entitled to send two members, was controverted by Henry Bromfield and others, on the ground, that, at a meeting held in said town for the purpose of electing a person to represent the same in the general court, Isaiah Parker was elected, and then the inhabitants voted to choose another representative, and elected the said Wetherbee; whereas "there was no article in the warrant which authorized the said inhabitants to elect more than one representative."[1]

The committee on elections, to whom the case was referred, do not appear to have made any report upon it. [Their silence, and the acquiescence of the house, afford a strong presumption, that the objection was regarded as groundless.]

[1] 27 J. H. 43.

1807—1808.

COMMITTEE ON ELECTIONS.

Messrs. *Edward Bangs*, of Worcester, *Laban Wheaton*, of Norton, *Caleb B. Hall*, of Buckstown, *Samuel H. Wheeler*, of Lanesborough and New Ashford, *Charles Davis*, of Boston.

TISBURY.

Where it was alleged against an election, that neither the warrant for calling the meeting, nor the notification thereof by the constable, contained any statement of the hour of the day on which it was to be held; and it appeared that one of the selectmen, after service of the warrant, altered the same by inserting the hour of the day therein, and directed the constable to make out a new notification, or alter the old one, which was done accordingly two days before the meeting; it was held, that the allegation against the election was not supported.

THE election of John Davis, returned a member from the town of Tisbury, was controverted by James Athearn and others, on the ground, among others, that the warrant for calling the meeting, and the notification thereof, by the constable, did not mention any hour of the day, on which the meeting was to be held.[1]

By a deposition of the constable, it appeared, that one of the selectmen altered the warrant, by inserting the hour of the day, and directed him "to make out a new notification or alter the old one, which he did, two days before the meeting was held."

The committee on elections reported, that Mr. Davis was constitutionally elected, and entitled to his seat, "the allegations against him not being supported." The report was agreed to.[2]

CHELMSFORD.

[THE election in Chelmsford was petitioned against and decided upon a mere question of fact as to the number of ratable polls in that town.]

CASE OF JOHN WAITE, MEMBER FROM FALMOUTH.

Member convicted of forgery suspended from acting.

A COMMUNICATION was received from the governor, inclosing a letter to him from the solicitor general, stating, that John

[1] 28 J. H. 112. [2] Same, 153.

Waite, a member from Falmouth, in the county of Cumberland, had been convicted of forgery. The communication having been read, Mr. Waite, the member implicated, presented a memorial, praying for a new trial upon the indictment, which stood continued for judgment, and also a memorial in favor of his character, signed by a great number of persons, both of which were committed to the committee on new trials. The communication from the solicitor general was referred to a special committee; and it was ordered, that Mr. Waite be suspended from exercising the duties of a member, until the house shall have taken further order upon the report of the committee.[1]

The committee on new trials reported a resolve on the memorial of Mr. Waite, granting him a new hearing on the indictment, which passed both branches, and was sent to the governor, but was subsequently returned by him to the house, at their request, and referred to a special committee, who do not appear to have made any report upon it.

The committee on the communication from the solicitor general do not appear to have made any report.

[1] This order was passed on the motion of Mr., afterwards Judge, Story, then a member from Salem.

1808—1809.

COMMITTEE ON ELECTIONS.

Messrs. *John Callender*, of Boston, *Samuel H. Wheeler*, of Lanesborough and New Ashford, *William Baylies*, of Bridgewater, *Abner Morse*, of Medway, *Samuel F. Dickinson*, of Amherst.

SHELBURNE.

The qualification of a member, as to property, being called in question, was allowed to be proved by the certificates of the selectmen and assessors of the town.

THE election of Julia Kellogg, returned a member from the town of Shelburne, was controverted by Peter Holloway and others, on the ground, that he did not possess, and had not within a year, next preceding his election, been in possession of, a freehold estate, within the said town of Shelburne, of the value of one hundred pounds, or any ratable estate, within the said town, to that value.

On behalf of Mr. Kellogg, the selectmen and assessors of Shelburne certified, that "he was, and for years had been, in possession of twenty-five acres of land, with a dwelling-house and other buildings thereon, lying in the centre of said town, for which he was taxed in the last year's assessment $6.43; valuation for 1807, $14.35, for 1808, $9.16, which was under mortgage, as a security for 900 dollars, 300 of which had been paid, leaving 600 due, which was not one-half the value of the place; and also, that he was the lawful owner of the one-half of a dwelling-house, merchant's shop, and one acre and a quarter of land, lying in the centre of the town, which a few years previous was appraised at $850." One of the assessors also certified, that Mr. Kellogg stood on the valution for 1808, real estate, $8.65, personal estate, $9.51.

On this memorial and evidence, the committee reported, that they were decidedly of opinion, that there was nothing contained in the memorial sufficient to invalidate the election. The report was agreed to.

WESTMINSTER.

The validity of an election being questioned, on the ground, that the town did not contain a sufficient number of ratable polls to entitle it to two members, a certificate of the assessors, corroborated by the selectmen, as to the number of ratable polls therein on the first of May preceding the election, was admitted as evidence of the requisite number.

The election of Jonas Whitney and Abel Wood, members returned from Westminster, was controverted by Benjamin Marshall and others, on the ground, that the town did not contain the requisite number of ratable polls to entitle it to two representatives.[1]

The petitioners alleged, that the number of rated polls in said town in the year 1807 was 208, and, that as the assessors had not made out their list of rated polls for the year 1808, the petitioners had, "according to their best skill and judgment, made out an accurate list of all the male inhabitants of sixteen years of age and upwards, including paupers, persons *non compos*, and superannuated, belonging to, residing in, and being inhabitants of, the said town of Westminster, on the first day of May, 1808, the whole of which amounted only to the number of 367.

On the other hand, the assessors of Westminster certified, that, from a careful examination of the number of ratable polls therein, on the first day of May, 1808, according to the best information they could obtain on the subject, the said town then contained three hundred and seventy-five ratable polls. This certificate was corroborated by the selectmen.

At the June session, the committee on elections reported a reference of this case to the next session, at which time, they reported that no testimony had been produced before them to invalidate the choice, or the right of the town to send two representatives, and therefore that the members returned were entitled to hold their seats.[2]

[1] 29 J. H. 19. [2] Same, 168.

RATABLE POLLS.

Where an election was questioned, on the ground of a deficiency of ratable polls, it was held, that the certificate of the assessors, or the tax bills of the year next preceding the election, were admissible as *prima facie* evidence of the number.

A COMMITTEE having been appointed to consider the meaning of the words "ratable polls," as used in the constitution, in reference to the number of representatives, to which towns are entitled, it was, upon their report (March 3, 1809),

Resolved, As the sense of the house, that in case the election of any member of the house of representatives shall be controverted on the ground, that any town, or town and district, has chosen and returned a greater number of representatives than such town, or town and district, were entitled by the constitution to elect, a certificate of the assessors, of the number of ratable polls within such town, or town and district, or the [names of persons borne on the] tax bills of the year next preceding such election, whose taxes, at the time of said election, shall be wholly unabated, shall be considered *prima facie* evidence by which to decide such election; subject, however, to be contradicted by such other evidence as may be produced by either party.

WEST SPRINGFIELD.

The election of four members, returned from the town of W. S., being questioned, on the ground of a deficiency of ratable polls; and it appearing to be doubtful, after long investigation, whether the town was entitled to return that number; that there had been much difference of opinion, as to the construction of the term "ratable" in the constitution; and that great diversity of practice had resulted therefrom throughout the commonwealth; the members returned were allowed to retain their seats.

THE election of Jonathan Smith, Jr., Jesse Stebbins, Charles Ball, and Jesse McIntier, members returned from the town of West Springfield, was controverted by Jonathan Parsons and others, on the ground, that the town did not contain a suffi-

cient number of ratable polls to entitle it to four representatives.[1]

The petition in this case was presented at the first session, and referred to the committee on elections, who reported a reference thereof to the next session, in order to give the parties an opportunity to produce their testimony.[2]

At the second session, sundry depositions were received[3] and referred to the committee, who thereupon reported[4] the following statement of facts, for the consideration of the house, namely:—

"It appeared to the committee, from the tax bills of the assessors of the town of West Springfield, dated the twenty-ninth day of April last, that there were six hundred and forty-four rated polls; and that from an additional list, certified by the assessors aforesaid, there were two hundred and twenty ratable polls on the thirteenth day of May last, not rated in said town. These two numbers amount to eight hundred and sixty-four, which is more than sufficient to entitle the town of West Springfield to four representatives. But the committee, from the evidence submitted to them, are of opinion, that forty-one names are improperly borne on the tax bills and list, which, deducted from the whole number of eight hundred and sixty-four, leave only eight hundred and twenty-three, a number insufficient by two to entitle the town of West Springfield to four representatives. At the present session, the sitting members produced a certificate from the selectmen and assessors of West Springfield, containing seven additional names, which they do not, however, certify to be ratable polls. Among the eight hundred and twenty-three polls allowed by the committee to be counted, there are four town paupers, which it is considered to have been the practice of the government to allow, in the enumeration of ratable polls. The committee further report, that the sitting members allege that three names, erased from the list, as twice counted, should have been permitted to remain there; because, although they are really twice borne on the list, yet, in the family of each of those per-

[1] 29 J. H. 20. [2] Same, 63. [3] Same, 127. [4] Same, 168.

sons, there is an additional poll, not borne on either list. Under these circumstances the committee respectfully submit the question to the decision of the house."

This report being taken into consideration, the case was again referred to the next session,[1] and commissioners appointed to take depositions in the mean time.[2]

At the third session, additional depositions were received and referred to the committee,[3] who, upon consideration thereof, made the following report, namely:—

"From the testimony produced, both for and against the sitting members from West Springfield, the committee have added, to the list of ratable polls of said town, twelve names, making the list of rated and ratable polls, in the town, amount to eight hundred and thirty-five. But on the list of two hundred and twenty polls, stated by the selectmen of the town to be ratable, although not actually rated, the committee have enumerated thirty-one persons, of whose liability to be rated in said town, the committee entertain considerable doubts, and two persons under sixteen years of age. The thirty-one persons referred to were such as either had a house and residence in a neighboring town, and came in, during the working season, to let themselves to labor in West Springfield, for a term of time, generally from one to seven or eight months, or were transient persons, having no fixed residence. If the house should be of opinion, that such persons, although not taxed in West Springfield, could be counted as ratable polls for the purpose of increasing the representation of said town, then the committee are of opinion that the sitting members should hold their seat; otherwise, the committee do report, that the sitting members are not duly elected, and therefore not entitled to hold their seats."[4]

The report was re-committed for the purpose of a further statement of facts,[5] and the committee again made report:—

"That although there have been, in their opinion, considerable irregularities in the conducting of the election, and although it is extremely doubtful whether the town of West

[1] 29 J. H. 168. [2] Same, 174. [3] Same, 188, [4] Same, 237. [5] Same, 244.

Springfield is constitutionally entitled to send four representatives, yet, as there appears to have been much difference of opinion in the construction of the term 'ratable' in the constitution, and great diversity of practice resulting from it, throughout this commonwealth, the committee are of opinion, that the sitting members be permitted to hold their seats." The report was agreed to.[1]

[1] 29 J. H. 255.

1809—1810.

COMMITTEE ON ELECTIONS.

Messrs. *John T. Apthorp*, of Boston, *Thomas Kittredge*, of Andover, *Nahum Mitchell*, of Bridgewater, *William Edwards*, of Northampton and Easthampton, *Hannibal Hamlin*, of Waterford.

WESTON.

Of the qualification of voters as to residence.

Where a member returned was elected by a majority of one vote, and it appeared that several persons, legally qualified, who were present and desired to vote at the election, were prohibited by the selectmen from doing so, the election was held void, although it did not appear, that any more than one of the rejected voters would have voted against the sitting member, if they had been permitted to vote.

The election of Ebenezer Hobbs, returned a member from the town of Weston, was controverted by Joseph Russell and others, on the several grounds that the selectmen were improperly chosen, and also that they rejected votes which ought to have been admitted.[1]

The committee on elections do not appear to have con-

[1] 30 J. H. 5.

sidered the first point, but in relation to the other they reported,[1] "that the member returned had a majority of one vote of all the votes given in; and that several persons legally qualified, and who ought to have been permitted to vote, were prohibited by the selectmen from giving in their votes, although they were then present, and desired to have that privilege;" for which reason, the committee were of opinion that Mr. Hobbs was not legally chosen.

The committee accompanied their report by the following statement of facts, respecting the qualifications of five persons, who were prohibited by the selectmen from voting:—

1. "Alpheus Bigelow, Jr., is a young man, whose parents are settled and reside in Weston, where he was also born; he is about twenty-four years of age, and is now a student at the University in Cambridge, in the junior class; he performs on Sundays upon the organ at Cambridgeport meeting-house, for which he receives a compensation; he resides at Weston during vacation, unless he can obtain employment elsewhere, which he sometimes has done; he has his washing and mending done at his father's, in Weston; his name has been on the list of voters for governor and senators, and he has, in fact, voted at those elections in Weston, and no objection was made to his want of property. He applied to the selectmen, previous to the time of voting, at the same time that others did, who were admitted, to have his name also put upon the list of voters for representatives, in May last, but was refused by the selectmen; he still attended the meeting, and tendered his vote [for a candidate opposed to Mr. Hobbs,] which was also refused.

2. "Isaac Saunderson is also a native of Weston, where his father was settled, and is a young man, and unmarried; he resided at Lexington, about forty days in the spring of 1808, viz.: from the 16th April till the general election in May, and also, about three or four days in June following; he was at Lexington only for the purposes of education, and labored a portion of the time there to pay for his board: his father then

[1] 30 J. H. 62.

died, and he was administrator or executor on his father's estate, and has resided at Weston ever since. He voted for governor and senators in April last; he applied to have his name placed upon the list of voters in May, but was refused; he attended the meeting but did not vote, and the only objection made by the selectmen, to putting his name on the list, was his want of residence in Weston.

3. "Jonathan Ryan came into Weston, in March, 1807; lived there the greater part of the year; in the winter following he was absent, and returned again, March, 1808, and remained the whole of that year in Weston. About two months and a half in the beginning of the year 1809, he was absent on a journey, but returned last March, and has resided there ever since; he applied in season to be put upon the list of voters at May meeting, but was refused by the selectmen for want of residence only; he attended the meeting, but did not vote. During the absence of two months and an half, before mentioned, his brother, at his request, supplied his place.

4. "Nathan Childs lived in Weston, with Mrs. Jane Clark, from November, 1806, till April, 1808, and continued at the same farm, which was sold to Mrs. Mackay, the mother of Mrs. Clark, until November, 1808. Mrs. Clark then went to live in Boston, and some difficulty occurring, with respect to Childs's wife, he went to live with Mrs. Clark in Boston, agreeing to return to work upon the said farm, whenever called upon, and actually did, in the winter, go there several times, and, since the spring opened, has worked there three several times, from five to seven days each time. Mrs. Mackay paid him one half his wages; considered him as in her employ, and has agreed with him to live with her till April 1st, 1810; and, during the time he was in Boston, he was frequently employed in loading her teams. Captain Mackay, son of Mrs. Mackay, who was interested in the aforesaid farm, paid Nathan Childs the other half of his wages. The objection, to his having his name placed on the list of voters, was his want of the qualification of residence.

5. "Woodbury Hill went to reside in Weston, in April,

1807, and let himself to Nathan Upham for a year, but staid only nine months; and on the 21st January, 1808, went to Brookfield, on a visit, and returned to Weston on the 2d February, and continued with Mr. Upham until the last day of December, 1808; then went to Brookfield, taking his effects with him, and returned again to Weston, on the 3d March, 1809, and has resided in Weston ever since. He applied to have his name placed on the list of voters, but the selectmen refused him the right. The objection to him was the want of residence."

The report was agreed to by a vote of 142 yeas to 100 nays.[1]

A motion was then made, that a precept issue to the town of Weston to send a new representative, which was determined in the negative.[2]

WRENTHAM.

Where the votes are given in, or are sorted, dealt with, and counted, in such a manner that the whole number of voters cannot be ascertained, the election is void.

THE election of Jairus Ware and Jacob Mann, members returned from the town of Wrentham, was controverted by Moses Whitney and others, on the ground, that it did not appear that they, or either of them, had a majority of the votes given in at the election.[3]

The following are the facts in this case, as they appear by the report of the committee on elections[4]:—

The meeting for the choice of representatives was legally convened, and it was voted to send two members. The selectmen called for the votes to be brought in, on a single piece of paper. Some persons gave in votes with two names on one piece of paper; some gave in two separate votes, with one name on each; and some gave in one vote, with one name thereon. After the votes were received by the selectmen, and *before* they were counted, those having two names upon them were cut in two, which prevented the selectmen from ascer-

[1] 30 J. H. 93. [2] See the case of *Weston*, 1810—11. [3] 30 J. H. 10. [4] Same, 62.

taining the number of voters. The selectmen stated the whole number of votes to be 368 (although it was certain that not nearly so great a number of persons was present), and that 93 made a choice. From a copy of the record of the proceedings at the town-meeting, it appeared that Jairus Ware had 130 votes, Jacob Mann, 124, George Hawes, 104, and that there were 10 scattering votes.

The committee reported that they were of opinion, upon these facts, that the election was void.

The report was made at the June session,[1] and from thence referred to the January session, at which it was debated and agreed to.[2]

HOPE.

It is no objection to the validity of an election, that a moderator was chosen and presided therein, instead of the selectmen.

The election of Firgus M'Lain, returned a member from the town of Hope, was controverted by Cheever Kendall and others, on the following ground, stated in their memorial, and proved by depositions accompanying it:[3]—

That the first article, in the warrant for the meeting of said town to elect a representative, was to choose a moderator; that one was chosen accordingly, who presided in the meeting instead of the selectmen; called for, received, and counted the votes; and publicly declared in the meeting, that they had chosen Firgus M'Lain their representative.

The committee on elections made a report in favor of the election, which was agreed to.[4]

[1] 30 J. H. 62. [2] Same, 184. [3] Same, 10, 123.

[4] Same, 280. In consequence of the remarks, made upon the report of this case, by the committee on elections, in the case of *Dan Hill*, 1847, the papers and records from which the same was compiled have been again examined; but nothing has been discovered tending to throw any doubt upon the statements contained in the report. No other ground of objection to the election is stated in the memorial, or testified to, than that a moderator was chosen, who presided at the election, instead of the selectmen. The depositions, though taken apparently without notice to the member, were such as had been commonly introduced in evidence in election cases, and were

FREETOWN.

Where two members were chosen in a town, which, from a certificate of the assessors thereof, *as to the number of persons actually taxed therein*, did not appear to contain ratable polls enough to entitle it to two members, and one member only was returned;—he was allowed to retain his seat.

The election of the two members chosen in Freetown, was controverted,[1] on the ground, that the town did not contain a sufficient number of ratable polls to entitle it to send two representatives; and, by an affidavit of the assessors, it appeared, that the number of polls actually taxed therein, in the year 1808, was two hundred and ninety-nine.

At the June session, the committee on elections reported[2] a reference of the subject to the next session, which was agreed to, and towards the close of that session they again reported, that there was but one member returned from the town of Freetown, and, inasmuch as no evidence had been produced to show that the town did not contain a sufficient number of ratable polls to entitle it to send two members, it was unnecessary to act further on the subject. The report was agreed to.[3]

referred, with the other papers in the case, to the committee. The return of the election was in the form required by law, and was signed by the selectmen. The report was, "That the town of Hope is entitled to send a representative, and therefore that Firgus M'Lain is entitled to his seat;" and though apparently not responsive to the allegation of the memorial, was nevertheless a substantial confirmation of the validity of the election.

The committee, having included in the same report several cases, in which the question depended upon the number of ratable polls, may have inadvertently referred to the case of Hope, as one of them; or as the town was incorporated in June, 1804, with "all the powers, privileges, rights, and immunities" of towns; but did not send a representative until this year; this fact may perhaps have occasioned the statement in the report that the town of Hope was entitled to send a representative.

[1] 30 J. H. 40. [2] Same, 123. [3] Same, 286.

BATH.

Mode of ascertaining the number of ratable polls in a town, when an election is controverted on the ground of an insufficiency thereof.

Where an election was controverted, on the ground of a deficiency of ratable polls, the sitting members were required to lay before the committee on elections, and to furnish the petitioners with, a list of persons whom they alleged to be ratable polls; and the petitioners, within a reasonable time, afterwards, to furnish the members with a list of such persons thereon, as they alleged not to be ratable polls.

The election of Samuel Davis, William Webb, and Jonathan Hyde, the members returned from the town of Bath, and who were elected by a general ticket, at one balloting, was controverted by Joshua Wingate, Jr., and others, on the ground, that the town of Bath, on the first day of May, 1809, contained no more than five hundred and sixty-four ratable polls, and therefore, was constitutionally entitled to elect but *two* representatives for that year.[1]

The committee on elections, to whom the memorial of the said Wingate and others was referred, at the June session, reported a reference of the subject, to the next session;[2] and ordered that the members from Bath should lay before them, at that time, a list of those persons in said town, whom they alleged to be ratable polls; that the said members should also furnish the petitioners with a copy thereof; and that the petitioners should, within a reasonable time, furnish the said members with a list of such persons thereon, as they alleged not to be ratable polls; in order, that the committee might determine, at the next session, upon such evidence, as the parties might then produce, in reference to the polls objected to, whether the town of Bath was entitled to three representatives or not.

The reference was agreed to by the house, and in pursuance of the order of the committee, the list and copy required were furnished by the members, and the objectionable names given by the petitioners.

At the January session, depositions were produced before

[1] 30 J. H. 29. [2] Same, 123.

the committee, to prove who, on the disputed list, were or were not ratable polls, and the committee, upon a consideration thereof, reported, that the town of Bath contained a sufficient number of ratable polls to entitle it to send three representatives. The report was agreed to.[1]

DIGHTON.

An election being controverted on the ground of an insufficiency of ratable polls, and the selectmen having neglected to furnish the petitioners with a list of the polls, agreeably to an order of the committee on elections, the election was invalidated, on presumptive evidence of the insufficiency.

Where members are elected, at separate ballotings,[2] the elections of those only, who exceed the number to which the town is entitled, are affected by an insufficiency of ratable polls.

The election of George Walker, one of the two members returned from the town of Dighton, was controverted by Joseph Atwood and others, on the ground, that the number of ratable polls in said town did not entitle it to two representatives.[3]

The petition was accompanied by an affidavit of James Briggs, one of the assessors of Dighton, for the year 1808, from which it appeared, that the number of polls, rated on the tax bills for that year, was two hundred and ninety-eight, and that in the same tax bills, forty-three persons were rated for their estates only, their polls being excused on account of age and infirmity: that the aggregate of these two numbers, three hundred and forty-one, was considered by the assessors, as including all the male inhabitants of the town of Dighton, that were ratable on the first day of May, 1808, either for their polls or property: and that in his opinion, the number of ratable polls in 1809, differed but little from that of the year preceding.

The petitioners also furnished an affidavit of James Gooding, 2d., in which he testified, that on the 23d of May, 1809,

[1] 30 J. H. 286.

[2] It is not distinctly stated, in the case, that the members were elected at separate ballotings; but this is clearly implied in the conclusion of the report.

[3] 30 J. H. 38, 63.

he applied to one of the assessors of said town, who was also an assessor the last year, to certify the number of polls therein, as set down in the last year's valuation, which the said assessors refused to do; but that upon an inspection thereof, he found the number to be 298.

The committee on elections directed the selectmen of Dighton, to furnish the petitioners with a list of the male inhabitants of the said town, who were twenty-one years of age and upwards, which they neglected to do; and, thereupon, the committee, on the evidence above stated, reported, that it did not appear, that the town of Dighton contained a sufficient number of ratable polls to entitle it to send two representatives, and therefore that George Walker, the second member chosen, was not entitled to a seat in the house. The report was agreed to.[1]

OXFORD.

Where it had been the immemorial custom, for the inhabitants of a town, and the inhabitants of an adjoining unincorporated territory, to unite in the choice of representatives, and they had also been unitedly taxed for the expenses of representation;—it was held, that the latter were properly enumerated among the ratable polls of the town, to entitle it to two members.

Abijah Davis and James Butler, the members returned from the town of Oxford, were chosen at two different meetings, the former on the first, and the latter on the eighteenth of May, and the election of Butler was controverted by David Harwood and others, on the ground, that the town did not contain a sufficient number of ratable polls to entitle it to two representatives.[2]

The committee on elections, at the June session, reported a reference of the case to the next session, which was agreed to:[3] and at the January session, they reported, that the town of Oxford did not contain a sufficient number of ratable polls, to entitle it to two representatives, without including the Oxford Gores, so called; that there was no satisfactory evidence, that

[1] 30 J. H. 286. [2] Same, 15. [3] Same, 62.

the gores were ever incorporated, nor was there any evidence of the incorporation of the town itself, but it had been the immemorial usage of the inhabitants of the town and gores to unite in the choice of representatives, and they had been unitedly taxed for paying representatives; and that, for these reasons, the committee were of opinion, that there was not sufficient evidence upon which to adjudge the election void. The report was agreed to.[1]

[Amos Shumway, whose deposition was before the committee, testified, that he was in his eighty-eighth year, and that, ever since his remembrance, the inhabitants of the gores had voted for representatives, and had paid province, state and county taxes, in the town of Oxford.]

MEDFORD, PETERSHAM, HARVARD, HINGHAM.

Assessor's certificate—presumptive evidence of the requisite number of ratable polls.

THE elections of one of the members, returned from each of the towns of Medford, Harvard, and Petersham, and the election of the three members returned from Hingham, were controverted on the ground of a deficiency of ratable polls, and were all confirmed; upon what evidence in the three last named, does not fully appear from the papers on file, but in the town of Medford, by a certificate of the assessors, that the town contained the requisite number of polls.

DURHAM, MENDON.

[THE elections in Durham and Mendon were questioned, (the latter on the ground of a deficiency of ratable polls,) but no evidence was produced to the committee to invalidate them.]

[1] 30 J. H. 286.

BRADFORD, CHARLTON.

[The elections in Bradford and Charlton were also questioned for the same cause, and the evidence produced not being satisfactory to the committee, they reported, towards the close of the January session, that it was not expedient to take any further order relative thereto. The report was agreed to.]

BOSTON.

[The election in Boston was controverted, and, during the consideration thereof, *Mr. Apthorp* was excused from serving on the committee, and *Mr. Davis*, of Beverly, appointed to take his place. The papers are not on file.]

1810—1811.

COMMITTEE ON ELECTIONS.

Messrs. *Joseph E. Sprague, Jr.*, of Salem, *Samuel P. P. Fay*, of Cambridge, *Estes Howe*, of Sutton, *John Nevers*, of Northfield, *Abraham Lincoln*, of Worcester.

REPORTER.

David Everett, Esq., of Boston.[1]

[1] Mr. Everett was appointed reporter to the house in cases of controverted elections, at the January session, 1811, and was re-appointed the following year. The debates and proceedings of the house, upon the report of the committee on elections in the Belchertown case, were originally reported and published by him.

WESTON.

Of the qualification of voters as to residence.

THE election of Ebenezer Hobbs, returned a member from the town of Weston, was controverted by Joseph Russell and others, on the ground, that two votes were illegally rejected, and two illegally received, at the said election.

The committee on elections reported the following statement of facts in this case:—

At the election in question, eighty-one votes were given for Ebenezer Hobbs, and eighty for Isaac Fisk. Two votes were given in by Alpheus Bigelow and Woodbury Hill, (who were not on the list of voters and had been refused by the selectmen) for Isaac Fisk, and were by the direction of the selectmen, taken from the box by Mr. Hobbs, who, as one of the selectmen, presided at the meeting. Alpheus Bigelow, whose father resides in Weston, left that town several years since, and lived nine months in Charlestown, from whence he removed to Boston, where he lived four months, and during his residence in one or the other of these places, he attained to the age of twenty-one. From Boston, he removed to Lynn, where he continued five months, as an instructor in the Lynn academy, and from Lynn he immediately entered Harvard College, where he still continues. He has passed his vacations principally in Cambridge, writing in some of the public offices, and acting as an organist, and has occasionally been in Weston, at his father's, where his washing and mending are done. Woodbury Hill came from Brookfield to Weston in 1807, and in March 1809, contracted with Nathan Upham, to work in his paper-mill ten months. Two days previous to the expiration of the ten months, (about the last of December, 1809,) Hill again contracted with Upham, to work with him one year, to commence on his return from a visit to his friends in Brookfield; the time of his return to depend on his own pleasure. Immediately after his contract, Hill went to Brookfield, from whence he returned in three weeks, to Weston, where he has

continued to the present time. He became twenty-one years of age, some time in the month of July, 1809. Uriah Warren, whose vote was received, resided in Weston for eighteen years previous to the election, and was absent only four weeks, on a journey to Maine, in the year next preceding the election.[1] John Stimpson, whose vote was admitted, produced to the selectmen sufficient evidence that he was worth the property, required by the constitution, to qualify him to vote for representative. Ephraim Dudley resided one year next preceding the election in Weston, and during that time, worked out of town only one or two months, by the day.

The committee also reported their opinion, upon this statement of facts, that Mr. Hobbs was entitled to a seat.

The report was agreed to, and on the day following, a motion was made to reconsider the vote, and was decided by yeas and nays, in the negative—yeas 105, nays 127.[2]

[In this case, the election was questioned on the ground, that two votes were illegally received, and two illegally rejected. The latter were those of Bigelow and Hill, which were tendered for Fisk. The votes alleged to be illegally received were those of Stimpson and Dudley, who, the committee found, were entitled to vote. But the committee also reported, that Hobbs was duly elected. It is clear, therefore, although it is not so stated, that Stimpson and Dudley voted for Hobbs; and that the committee and the house were of opinion, that the votes of Bigelow and Hill were rightfully rejected.]

[1] There is no objection made in the petition to the vote of Uriah Warren.

[2] See the case of *Westford*, 1812—13.

SUTTON.

Where a petition against an election was not committed, until so late a period of the session, that an investigation could not conveniently be had, no order was taken thereon.

The election of Darius Russell, Jonas Sibley, Josiah Stiles, and Estes Howe, members returned from the town of Sutton, was controverted by Caleb Burbank and others, on the ground, that the town did not contain the requisite number of ratable polls to entitle it to four representatives.

The petition in this case was received at the May session,[1] but does not appear to have been referred to the committee on elections, until the January session, when they were directed to take up the subject and report as soon as may be.[2]

A deposition of Caleb Burbank and others was also received at the January session, and referred to the committee.[3]

On the twenty-fifth of February, the house ordered the committee to make their report on the case, the next day,[4] at which time, they accordingly reported, as follows:—

"The petition in the case of the Sutton election was never committed until the fourteenth of February instant, and no person ever appeared, previous to that day, before the committee, to support the charges therein. On the twenty-first day of February, a deposition (of Caleb Burbank and others) passed through the house to the committee, stating that the chairman of the selectmen did, at the May meeting, declare, that the expense of four representatives should not exceed the pay of two. The committee could not consistently with propriety, and according to their rules of proceeding, examine the last charge, which went to affect the seats of all the members, without previously notifying all the members to attend before them, and this charge was presented to them so late in the session, that it was impracticable to give such notice, as two of the members had returned to Sutton. The charge in the petition affected the right of Darius Russell alone, to his seat

[1] 31 J. H. 36. [2] Same, 309. [3] Same, 336. [4] Same, 337.

in this house, as the petitioners admitted that the town of Sutton contained more than six hundred ratable polls, and that the members returned were chosen by separate ballots, and they also proved that Darius Russell was last chosen. The committee gave notice to said Russell to appear before them, as soon as they could, consistently with the other business committed to them, and after hearing the petitioners, they should have called upon said Russell to shew his right to a seat, had there been a reasonable time, during the sitting of the legislature, for him to have returned to Sutton and procured evidence. But the committee are of opinion, that there was not time from the commitment of the petition, to the close of the session, for that purpose, and therefore report, that the house do not take any further order thereon." The report was agreed to, 98 to 41.[1]

[Among the papers on file in this case, there is a certificate of the assessors of Sutton, that there were eight hundred and twenty-five ratable polls and upwards therein, on the first day of May, 1810.]

SUDBURY.

Where the election of two members was objected to, on the ground of an insufficiency of ratable polls, and one only was returned, it was held, that the objection did not affect the right of such member.

The election of the members chosen, one of whom only was returned, from the town of Sudbury, was controverted by Ebenezer Plympton and others, on the ground, that said town was not entitled, by the number of ratable polls therein, to more than one representative.

The committee on elections reported, "that the petition admits the right of the town of Sudbury to send one representative, and it appearing, by the return from said town, that one representative only is returned, the committee therefore

[1] 31 J. H. 411.

report, that the right of William Hunt, the member returned from said town, to a seat in this house, is unaffected by the facts stated in the petition." The report was agreed to.[1]

[It does not appear whether the members were elected at the same balloting or separately.]

STANDISH.

A delay of more than two hours, after the time appointed, to open a meeting for the choice of a representative, was held to be no objection to the validity of the election.

The election of James Hasty, returned a member from the town of Standish, was controverted by William Thompson and others, on the following grounds, stated in their petition[2]:—

"That the meeting for the choice of a representative, in said town, was appointed to be held at one o'clock in the afternoon, at which time, the petitioners attended, and found the selectmen, town clerk, and constable present; that they waited until a quarter past three, and called, at two several times, for the opening of the meeting, which was refused by the selectmen; that, concluding thereupon, that there would be no meeting opened, they dispersed; and that the selectmen afterwards called in a party, who, the petitioners suppose, elected the member returned."

The committee on elections reported, that these facts, if proved, would not affect the right of the member to his seat. The report was agreed to.[3]

RAYMOND, EASTON.

Assessors' certificate;—evidence of the number of ratable polls.

The elections in these towns were controverted on the ground of a deficiency of ratable polls. The member returned

[1] 31 J. H. 59. [2] Same, 37. [3] Same, 53.

from Raymond produced a certificate of the assessors thereof, stating that the said town contained the requisite number of polls, which was not disproved by the petitioners; and the petitioners in the other case produced no evidence. The committee on elections made a report in favor of the members, which was agreed to.

SHEFFIELD.

The provision in the constitution, that every town then incorporated might elect one representative, whether it contained the requisite number of ratable polls or not, extends to towns, which, by their acts of incorporation, were not allowed to send a representative, but, for that purpose, were united to other towns.

The election of Silas Kellogg, returned a member from the town of Sheffield, which had previously united with the town of Mount Washington in the choice of a representative, was controverted by the latter town, on the ground, that the votes of the inhabitants thereof had been improperly and illegally rejected by the selectmen of Sheffield.[1]

It appeared by a memorial of the selectmen of Sheffield, that they gave notice to the selectmen of Mount Washington, that the votes of the inhabitants of that town would not be received, at the meeting for the choice of a representative in Sheffield, as had been the practice in former years; and that this notice was given in season to have enabled the selectmen of Mount Washington to call a meeting for the election of a representative therein, if they had seen proper to do so.

The committee on elections reported, that Mount Washington was incorporated as a town, previous to the adoption of the constitution, with all the powers, privileges, and immunities of towns, except the sending of a representative, for which purpose it was annexed to Sheffield, and the inhabitants thereof, in the choice of representatives, were considered, to all intents and purposes, as inhabitants of Sheffield; that the third section of the first chapter of the constitution, having

[1] 31 J. H. 40.

provided that every town then incorporated might elect one representative, did thereby give to the town of Mount Washington the right to vote by itself in the choice of representative; and, therefore, that Silas Kellogg, the member returned from Sheffield, was duly elected and entitled to his seat.[1]

LANESBOROUGH AND NEW ASHFORD.

Question as to the mode of conducting the meeting and receiving votes, where towns act together in the choice of representatives.

By a return, certified by the selectmen of Lanesborough and New Ashford, it appeared, that Samuel Hill Wheeler was elected a representative from those towns; and by a certificate, signed by the selectmen of New Ashford alone, it appeared, that Richard Whitman was also elected.

At the May session, the committee on elections were ordered to inquire and report specially in relation to these returns.[2] The committee reported a reference of the subject to the next session, which was agreed to,[3] and at the January session, they reported the following statement of facts[4]:—

"The district of New Ashford was incorporated, February 26, A. D. 1781, with all the privileges of towns, that of sending a representative only excepted;" but, "by their act of incorporation," liberty was granted them to join "with Lanesborough for that purpose." A meeting was legally warned in May last, by the selectmen of Lanesborough, and of the district of New Ashford, [for the choice of representatives]. At said meeting it was agreed to determine, by ballot, the number of representatives they would elect. The selectmen of Lanesborough received the votes of the voters residing in Lanesborough, and the selectmen of New Ashford the votes of the voters residing at New Ashford. The majority of the votes, received by the selectmen of Lanesborough, was to elect one representative. The majority of the votes, received by

[1] 31 J. H. 102. [2] Same, 47. [3] Same, 173. [4] Same, 232.

the selectmen of Lanesborough and New Ashford, added together, was to elect two representatives. The selectmen of Lanesborough and New Ashford received the votes for one representative, and Samuel Hill Wheeler was chosen. The selectmen of Lanesborough, and most of the voters residing in Lanesborough, immediately withdrew. The selectmen of the district of New Ashford then received the votes of the voters, residing in New Ashford, for a second representative, and the majority of the votes so given were for Richard Whitman." This report was ordered to lie on the table, and does not appear to have been afterwards called up.

[The result of the proceedings in this case was to confirm the election of both the members returned. It may consequently be inferred, that the votes of the two towns, on the question of the number of representatives to be sent, were considered to have been properly counted together; and that the voluntary withdrawal of the selectmen and some of the voters of Lanesborough could not have the effect to deprive the town of New Ashford of the right to proceed and elect another representative, in pursuance of the vote of both towns to elect two.]

CONCORD.

Of the qualification of voters, as to residence.

The election of Tilley Merrick, returned a member from the town of Concord, was controverted by Jonas Lee and others, on the following grounds alleged in their petition[1]:—

1. Because four persons were admitted to vote in the election, who were not qualified in respect to residence;

2. Because three persons were admitted to vote therein, who were not qualified in respect to property;

3. Because the votes of six persons who were qualified voters were illegally rejected; and

[1] 31 J. H. 38.

4. Because, if the votes, thus illegally received, had been rejected, the sitting member would not have had a majority of the votes, and if the votes, improperly received, had been rejected, Joseph Chandler would have had a majority.

This case, at the May session, upon the report of the committee on elections, was referred to the next session,[1] at which a great number of depositions were received, and the committee on the seventh of February, made a report[2] containing a statement of facts, as follows:—

"At a legal meeting of the voters in Concord, for the purpose of electing a representative, on the 7th day of May last past, the votes were as follows, to wit: for Tilley Merrick, 129, Joseph Chandler, 124, Stephen Barrett, 1.

The selectmen of Concord have, for several years past, adopted the following rule, relative to the admission of voters, to wit, that every man otherwise qualified, who was resident in Concord on the day of election, and also on the same day of the year next preceding, although he might have been absent between those periods, should be considered as having a constitutional residence.

The petitioners state, that the votes of John Dumerry and Thomas Dix, who had not a year's residence in Concord, were received in this election, and the votes of Jonas Wheeler, Charles Robbins, William Ward, Samuel Melvin, Jr., Charles Melvin, and Thomas F. Lawrence, legal voters, were rejected at said election, on the pretence that they had not the residence required by the constitution. The committee find, that John Dumerry was an indented apprentice to Mr. Vose, of Concord, and was twenty-one years of age in December, 1809; he continued to live with Mr. Vose until April last past; he then went to Charlestown, on a contract for one month; on the expiration of the month, he returned to Concord on Saturday previous to the election; he was undetermined when he returned to Concord, whether he should continue in Concord or return to Charlestown; and the day subsequent to the elec-

[1] 31 J. H. 173. [2] Same, 284.

tion, he returned to Charlestown and there contracted to work one year.

Thomas Dix was an indented apprentice to Mr. Brown, of Concord, and was twenty-one years old in October last; he then went to Bangor and there worked at the saddler's trade four months on hire, and returned to Concord, where he continued until the election; after the election he went to Weston, to work for Mr. Hobbs.

Samuel Melvin, Jr., was born in Concord, and lived there until February, 1809; he then went to the state of New York, where he continued until November, 1809, when he returned to Concord; he left his tools and clothes at Concord, when he went to New York.

The committee are of opinion, that the selectmen, in receiving the votes of said Dumerry and Dix, decided correctly; and, as the said Melvin did in conversation give grounds to the selectmen, to believe that he had determined to establish himself in New York; the committee are also of opinion, that the selectmen did decide correctly in refusing his vote.

The committee also find that Jonas Wheeler was born in Concord, where his parents now live; that he was not absent from Concord, until he entered college, where he now continues; and spends all his vacations in Concord. Charles Robbins has lived several years in Concord; has frequently worked out of that town; he worked from May 3, 1809, to August 26, 1809, in Roxbury, his clothes were in Concord at his brother's, where his washing and mending were done; he was at Concord as often as once a fortnight, and had no other home; he was not on the list of voters in November, 1808, nor in the year 1809, and was not taxed in 1809.

Mr. Ward came to Concord in March, 1807, to live with D. Wheeler, where he continued until March, 1809; he came of age March, 1809; he then let himself to Wheeler for six months; after the expiration of this contract, he entered into partnership with Wheeler, and continued with him until December, 1809, when he went to Groton academy, where he continued seven weeks: he returned to Wheeler's in March,

and continued there until the last of April; he then let himself for four months in Lincoln, but agreed with Wheeler to return on the first of September, to carry out beef, on shares; his trunk, clothes, and papers, were, during all this period, at Wheeler's, whose house he considered his home; he did military duty in Concord, on the first of May, where he was taxed in 1809; he was also taxed for repairing the highways, in March, 1810, and voted at the April election in Concord.

Charles Melvin is twenty-five years old, and has resided in Concord ever since he was sixteen; since he was twenty-one, he has worked two years at farming, for Mr. Head, of Concord, and has worked part of three summers out of Concord; he never worked more than four months in any town but Concord since he was twenty-one; and, in April, 1809, he let himself to work six months, on the Middlesex turnpike, out of Concord. His chest and clothes have been in Concord, where his clothes have been mended, and he has always considered Concord as his home; he was not taxed in 1809, nor on the list of voters; he was a corporal in a company in Concord, and was excused from military duty, at the May training, on his own allegation, that he was liable to military duty in Acton, where he worked for a fortnight.

Thomas F. Lawrence lived, before he was twenty-one, with his brother, in Concord; after that time, he worked for him three or four years, except in the winter season, when he was keeping schools at different places; in September, 1808, he purchased a farm in Concord, which he still owns; in December, 1808, he took a school in Acton, for ten weeks; he then returned to Concord, where he remained one month, and then let himself to Seth Brooks, of Acton, for eight months, reserving liberty to return during that term, to Concord, to attend to his farm, and to assist his brother; during that term, he was in Concord as often as once a fortnight; he carried, during that term, several loads of wood from his farm in Concord to Cambridge, and assisted his brother in Concord in his haying, and was fourteen days in Concord, during that term; his

clothes and papers were at his brother's, in Concord, whose house he considered his home.

The committee are unanimously of opinion, that said Wheeler, Robbins, Ward, Melvin, and Lawrence, were entitled to vote in said election.

Four votes would vary the result of this election, and the committee are of opinion, that five votes were illegally rejected. But considering that the laws of this commonwealth afford ample redress to those persons, whose votes are illegally rejected, and that the selectmen of towns, on the eve of elections, have not the opportunity or power of thoroughly investigating nice questions of residence, and may, even after the most thorough examination, and actuated by the most correct motives, form erroneous opinions, on these difficult questions: therefore, the committee, although they are convinced that the selectmen of Concord did decide incorrectly, are also convinced that their error was that of judgment alone, and that Tilley Merrick, the returned member, do retain his seat."

This report was several times considered, on different days, and was finally recommitted[1] on the fourteenth of February.

On the twenty-seventh of February the committee reported[2] an amendment to their former report, by adding thereto, that "the five persons, whose votes were rejected, did, on the day of election, tender their votes for Joseph Chandler."

The report was again recommitted, and on the next day, which was the last of the session, it was ordered that the further consideration of all controverted elections, yet undecided on, be postponed till the first day of May next.

[The following report, signed by the chairman of the committee, appears among the papers on file:—

"The committee on elections beg leave to lay before the house their report on the Concord election, with the following amendment:

Strike out the last sentence, and insert in place thereof, 'Four votes might affect the election, and your committee are

[1] 31 J. H. 285, 314, 315. [2] Same, 408.

of opinion, that five were illegally rejected. Therefore said Tilley Merrick is not entitled to a seat.'" This was probably intended to have been reported by the committee, in order to make their first report conform to the evident inclination of the house, (as manifested by their votes of recommitment,) to consider the election void, if the further consideration of the subject had not been cut off by the order above mentioned.]

BOSTON.

Question, whether aliens are ratable polls upon which to predicate a representation.

THE election of the forty-two members, returned from the town of Boston, was controverted by Edward Proctor and others, on the ground that the ratable polls in said town did not entitle it to that number of representatives. The petitioners alleged, that the number of representatives elected had been predicated upon the lists of the assistant assessors of the several wards, which they conceived to be erroneous and false: 1. because, they contained the names of persons returned as ratable polls, within the town, who were not inhabitants thereof; 2. because, they contained the names of persons who were neither ratable nor rated polls, namely: ministers of the gospel, the grammar school-master, and minors under the age of sixteen years; 3. because the same individuals were returned thereon in several wards and repeatedly in one and the same ward; and 4. because the assistant assessors, for the year 1810, had returned an aggregate increase of ratable polls, to the amount of two thousand and one hundred beyond the total number of ratable polls, returned by the assessors for the year 1809.

The petition in this case was presented at the January session and referred to the committee on elections, who, on the thirteenth of February, were ordered to report their opinion thereupon as soon as may be.[1]

[1] 31 J. H. 305.

On the next day, the committee, in obedience to the said injunction, made the following report[1]:—

"The committee on elections beg leave to report, that they have heard the petitioners against the returned members from Boston, in part. They find, that it requires nine thousand three hundred and seventy-five ratable polls, to enable a town to send forty-two representatives to this house. The town of Boston did, in August last, contain, according to the census taken according to the laws of the United States, nine thousand one hundred and twelve males above the age of sixteen. The town did, in May last, according to the return of the assistant assessors thereof, contain nine thousand five hundred and and forty-seven persons, whom they termed ratable polls. The assessors made out their list by inquiring at the dwelling-houses and stores; their list contains the names of nearly twenty clergymen, the grammar school-master, the names of foreign consuls, and of officers in the army and navy of the United States. The list also contains the names of a great number of persons taken twice, at their boarding-houses and stores; and in many instances the same person is taken down three times; the list also contains the names of seven hundred and six aliens. The committee proceeded in the investigation, until they were convinced that it would require all their time, during the present session, to make a thorough investigation; and feeling that their duty to their constituents required their attendance in the house, during its session, they were induced to terminate the investigation, before the petitioners had examined their witnesses, and before the sitting members were heard in answer. The petitioners alleged that they could show, that several hundred persons were improperly returned by the assessors; and the sitting members alleged that they could show, that several hundred ratable polls had not been returned by the assessors. It appears to the committee, that no confidence can be placed in the return of the assessors, as it consists not only of the description of persons above stated, but contains also many christian names without sir-

[1] 31 J. H. 311.

names, and a great number of sirnames without christian names, and also names of persons belonging to other towns. Whilst the investigation has induced the committee to entertain serious doubts of the right of the town of Boston to send forty-two representatives, even admitting the right of the town to send a representation on aliens, yet the committee have no hesitation in reporting, that, if aliens are not to be represented, the town has greatly exceeded their constitutional right. The committee are of opinion, that within the intent and meaning of the constitution, aliens are not entitled to be represented in this house, as they are not parties to that compact; and, if they are correct in this opinion, the election of the forty-two members from Boston must be considered void, and the seats of the whole number vacated, as they were all chosen at one balloting."

This report was read and recommitted, and Messrs. *Ripley*, of Waterville, and *Jackson*, of Newton, were added to the committee.

On the twenty-seventh of February, the committee again reported as follows[1]:—

"The committee on elections beg leave to report, that they have examined several hundred witnesses, and find, by the testimony of Josiah Snelling, that the whole number of males, including aliens, persons in jail and in the poor-house, in Boston, in August last, over sixteen years of age, amounted to nine thousand one hundred and twelve; and they believe the said Snelling took the numbers with great accuracy. It appears, by a certificate of the assessors, that there were in Boston, in May last, nine thousand five hundred and forty-seven persons, over the age of sixteen, including aliens and persons in jail; and it appears, by another return, that there were in Boston, at the same time, exclusive of aliens, nine thousand nine hundred and sixty persons, over the age of twenty-one, who were legal voters, which list was made out from a list made by the assessors, and corrected by the selectmen—making eleven hundred and twenty-five citizens, over twenty-

[1] 31 J. H. 412.

one years of age, more than the town contained of persons, over the age of sixteen, at the same time.

The committee have found more than one hundred persons, twice taken, on the assessors' list; and also many inhabitants of other towns, students at Harvard college, nineteen ministers of the gospel, the grammar school-master, two foreign consuls, one captain in the navy, and one in the army of the United States, one member of this house from the district of Maine, and more than seven hundred and six aliens.

The sitting members have produced the names of several persons, who, they stated, are not on the list, and offered to show more. The committee found, on the list, one half, at least, of those offered by the sitting members, as not being returned thereon; and whether the other half are or are not returned, they have not had time to examine. But of this fact they are convinced, that there are more on the assessors' books, than were in Boston, on the day of election, although they cannot determine the precise number.

The committee would beg leave further to report, that they find, that the town of Boston has predicated a representation on seven hundred and six aliens, and they are of opinion, that, if this house should consider that aliens cannot form the basis of a representation, the said town has greatly exceeded its constitutional right in sending forty-two members. The committee are decidedly of opinion, that aliens cannot form the basis of a representation, for the reasons subjoined:—

Because it is a well known maxim, 'that the natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature; unless the intention, so resulting from the ordinary import of the words, be repugnant to sound acknowledged principles of national policy; and if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged, or restrained, so that it may comport with those principles; unless the intention of the legislature be clearly and manifestly repugnant to them.' 'Now we as-

sume, as an unquestionable principle of sound national policy in this state, that, as the supreme power rests wholly in the citizens, so the exercise of it, or any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is, therefore, to be presumed, that the people, in making the constitution, intended that the supreme power of legislation should not be delegated but by citizens; and if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions, which are not to be misunderstood: but the words, 'inhabitants,' or 'residents,' (or 'ratable polls,') may comprehend aliens, or they may be restrained to such inhabitants, or residents, (or 'ratable polls,') who are citizens according to the subject matter to which they are applied. The latter construction comports with the general design of the constitution. There the words, 'people' and 'citizens,' are synonimous. The people are declared to make the constitution for themselves and their posterity; and the representation in the general court is a representation of the citizens. If, therefore aliens could vote in the election of representatives, the representation would be, not of citizens only, but of others.' Or if aliens could be deemed as ratable polls, to give rights to the corporation in which they were residents, the equality of the representation of the citizens of this commonwealth, provided for in the constitution, would be destroyed, inasmuch as a town which contains one hundred and forty-nine citizens above the age of sixteen and no alien, would not be entitled to a representation, whilst on the other hand, a town containing but three citizens above the age of sixteen, and one hundred and forty-seven aliens, would be entitled to a representative; and in this last case, in this town, which contained but three electors and three persons qualified for representatives, these three persons would enjoy the right of electing and returning one of their number, and thus we should be exposed to all the evils of the rotten boroughs in England. 'It may therefore seem superflous to declare our opinion, that the au-

thority given to inhabitants and residents to vote,' (to predicate their representation on ratable polls,) 'is restrained to such inhabitants, residents, and ratable polls, as are citizens.'

'A question here arises, if the legislature can constitutionally provide that the polls of aliens shall be ratable.' 'If by this provision, aliens would acquire any political rights, to the diminution of the rights of citizens, we should for the reasons before given strongly incline to believe, that the legislature were restrained from making this provision. For as the political rights, arising under the constitution, are manifestly the rights of the citizens, the language of the constitution ought to be so construed, if practicable, that their rights should not be diminished, by sharing them with aliens.' But if a corporation could increase its representation in consequence of resident aliens, the rights of other corporations would be diminished thereby. 'It is extremely clear,' that by the payment of taxes, aliens 'acquire no political rights whatever.' And as they can acquire no political rights, so they can communicate none. 'Whether their polls are ratable or are not ratable, they are not qualified voters for senators or representatives, nor can they be qualified to hold either of those offices,' or increase the political rights of the corporation in which they reside. It is but reasonable that aliens residing amongst us, and receiving the protection of the law, should pay a reasonable price for their protection and security; and when they are obliged to pay no other taxes than those paid by citizens, they cannot complain. 'The right of sending a representative is corporate; this corporate right is also a corporate duty, for the neglect of which, a fine may be assessed and levied upon the inhabitants.' Now, if it would be competent for the legislature to impose a fine on a town, containing only one hundred and fifty polls, including the polls of aliens, it would also be competent for them to impose a fine on a town, containing one hundred and fifty alien polls, and no citizens; and this absurd consequence would follow, that a town which did not contain a single elector, or a person qualified for a representa-

tive, might be fined for not sending a representative. The committee have thus 'restrained the general import of the words 'inhabitants,' and 'residents,' (and 'ratable polls,') and in some parts of the constitution, to inhabitants and residents,' (and 'ratable polls,') 'who are citizens; that we might not unnecessarily fix on the people an intention of imparting any of their rights of sovereignty to aliens.'

The committee are, therefore, of opinion, that aliens, although they may, as the price of the protection of the government, be compelled to pay a capitation tax, yet they are not to be considered as ratable polls, within the meaning of the constitution, so as to form the basis of a representation;—that there is a very strong, and almost irresistible presumption, that the town of Boston has greatly exceeded her constitutional right, in sending forty-two members to this house; yet, as they have not been able to finish the investigation, they recommend, that the further consideration of the subject be postponed to the next session of the general court."

The report having been read, the further consideration thereof was postponed to the next Thursday; and, in the meantime, it was ordered to be printed.

On the twenty-eight of February, this case was indefinitely postponed, by the general order, mentioned in the case of the Concord election.

[While this case was under investigation before the committee, an order was passed, requesting the opinion of the justices of the supreme judicial court, on the principal question raised in it, namely, whether aliens are to be considered as ratable polls, in determining the number of representatives, to which a town may be entitled. The opinion of the court was received, before the committee had concluded their labors, and was made use of by them, in drawing up their report, though the committee came to a different conclusion. The passages in the report, marked as quotations, are extracted from the opinion of the court. See the order and opinion at the end of the cases for this year.]

GLOUCESTER.

Where several individuals, with a view to induce a town to elect six representatives, being the whole number to which it was entitled, of a particular party, gave a bond, for the use of the inhabitants, conditioned, that the whole expense of such a representation should not exceed the pay of two members;—an election, made under such circumstances, was held void, although the members elected had no agency in procuring such bond to be given.

Members have no right to vote on the question of the validity of their election.

The election of Thomas Parsons, John Manning, John Tucker, James Tappan, John Johnson, and Robert Elwell, members returned from the town of Gloucester, was controverted by William Pearce and others,[1] for the following reasons, stated in their petition:—

"1. Because a bond had been executed by individuals, and presented to the selectmen, and by them to the town, and read by the town-clerk in open town-meeting, and noticed in advertisements, posted up in the several parishes in the town, previous to the meeting, in order to influence the inhabitants to elect six representatives, and to indemnify the town for any expense, which might arise beyond the legal expense of two representatives;

2. Because the precedent, if established by the house of representatives, would prove fatal to the liberties and independence of the country; and the period might not be far distant, when a legislature would be assembled, under the pay and influence of a foreign country."

The petition was accompanied by certified copies of the papers referred to, and was referred to the committee on elections, who, on the eighth of June, made the following report[2]:

"The committee on elections beg leave to report, that a meeting was holden at Gloucester, on the fourteenth day of May, last past, for the choice of representatives; that five days previous to said meeting, notice was posted up in several parts of the town, that the expense of representatives, the past year, was one hundred and sixty-two dollars, and that a bond was

[1] 31 J. H. 30. [2] Same, 101.

lodged in the hands of the selectmen, to indemnify the town for any expense from a federal representation, above the full pay of two representatives. The bond referred to is dated May 7th, and is herewith submitted, as also one of the original notices, above referred to.[1] At the meeting previous to the choice of representatives, and after the town had voted to send six representatives, the bond was called for, and read, in the

[1] The following are copies of the notice and bond referred to:—

[NOTICE.]

STATE DOCUMENTS.

Treasury Office, Commonwealth of Massachusetts, May 4th, 1810.

This certifies, that the whole pay for the attendance of the six representatives, for the town of Gloucester, for May session, 1809, amounted to eighty dollars, being four dollars less than the attendance of two members, every day in the session. Also, that the attendance of said members, the last winter session, as it stands on the pay roll, is *only* eighty-two dollars, being less than the pay of one member, as the session held forty-two days. The above is taken from the rolls, at the request of an inhabitant of Gloucester.

JAMES FOSTER, 1st Clerk in Treasury Office, the Treasurer being absent.

The above is a true copy from the original, which is lodged in the hands of the selectmen.

Per order, WILLIAM DANE, Chairman.

N. B. A bond is also in the hands of the selectmen, to indemnify the town for any expense that may arise from a federal representation, above the full pay of two representatives, for the current year.

Gloucester, 9th May, 1810.

[BOND.]

Know all men by these presents, that we, the undersigned subscribers, are held and stand firmly bound, unto the inhabitants of the town of Gloucester, in the sum of five hundred dollars, to be paid to the said inhabitants, or to their certain attorney, by them appointed; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated this seventh day of May, in the year of our Lord one thousand eight hundred and ten.

The condition of this obligation is such, that, if the undersigned subscribers, their heirs, executors or administrators, do indemnify and save harmless the said inhabitants from any expense, costs, or charges, that shall or may be incurred by a federal representation, at the general court of this commonwealth, legally chosen by the said inhabitants of Gloucester, over and above that of the full pay of two representatives, for and during the whole term, or several terms the said general court shall be in session, the current year, then this obligation to be void—otherwise, to remain in full force.

BENJ. K. HOUGH, (Seal.)
WM. COFFIN, (Seal.)
SAMUEL GILBERT, (Seal.)
JONA. LOW, (Seal.)

Attest, WM. SAVILLE,
JOS. ALLEN, JR.

hearing of Thomas Parsons and John Tucker, two of the sitting members. The facts above stated are, in the opinion of the committee, of most dangerous tendency, as they necessarily tend to impair the freedom of election, and prevent many worthy men, whose feelings and principles forbid a resort to similar practices, from being elected members of this house. Impressed with the dangerous tendency of this practice, the committee would submit to this honorable house, whether, on the foregoing statement of facts, the sitting members shall be allowed to retain their seats."

The report was considered and debated in the house, and recommitted to Messrs. *Greene*, of Berwick, *C. Davis*, of Boston, *Ware*, of Wrentham, *Channing*, of Boston, and *Moody*, of Saco, who, on the next day, by their chairman, reported[1] as follows:—

"The committee, to whom has been committed the report of the committee on elections, upon the petition by a number of the inhabitants of the town of Gloucester, against the members returned from said town, ask leave to report: That they have attended to that business, and from a careful investigation of all the facts, relative to the subject, and after a full hearing of all the evidence that has been offered them in support of said petition, are of opinion, and do accordingly so report, that although the conduct of certain individuals, inhabitants of said town, relative to the election of the members aforesaid, is highly reprehensible, and such as ought not, and such, as in the opinion of your committee, never will be countenanced by this house; yet as it has not been made to appear to the satisfaction of the committee, that the said members were in any measure concerned in, or consenting to, those highly reprehensible transactions of certain individuals, inhabitants of said town, or that the same were in any way notified or approved by said town; that, therefore, the said town of Gloucester ought not to be disfranchised of their elective privileges, or the seats of the members aforesaid vacated thereby."

The report was agreed to.

[1] 31 J. H. 115.

On the twelfth of June,[1] Mr. Smith, of West Springfield, moved, that the vote on this report be so far reconsidered, that the same may be committed to the committee on elections, with instructions to inquire into the whole facts, respecting the said election; and particularly whether the bond, stated in the report, was accepted by the town or the selectmen thereof; whether the representatives elect were knowing of the fact of the giving of said bond; whether they had been requested, before the election, to be candidates, and if requested, by whom; and also, whether any like bond had been given to the town, in the year next preceding the present; and that the committee report their doings at the next session.

This motion was debated and decided in the negative, but shortly after the vote had been declared by the speaker, it was doubted, and after some further debate, the question was again put and decided in the affirmative.

On the thirteenth of January,[2] in the next session, the committee on elections requested to know, whether it was the wish of the house, that they should report their opinion on the statement of facts, which they were prepared to make in this case, and it was voted that they be requested to deliver their opinion thereupon.

The committee shortly afterwards, on the same day, made their report, as follows:—

"The committee on elections beg leave to report, on the petition of William Pearce and others, against the right of the members returned from Gloucester, that, after a repeated and critical examination, they find the following to be the facts, relative to their election. A meeting was holden at Gloucester, on the fourteenth day of May, last past, at which meeting the six gentlemen above named were elected by a majority, and are duly returned. Seven days previous to the meeting, a bond was left with the chairman of the selectmen, to indemnify the town from all expense of a 'federal representation' of six members, above the full pay of two members.

Notice was given of this bond by one or more notifications,

[1] 31 J. H. 146. [2] Same, 238.

posted up in public places in Gloucester, signed by the chairman of the selectmen. A day or two previous to the election, the gentlemen returned were publicly known to be candidates. Mr. Johnson, one of the members, was called upon by Mr. Nash, to stand as a candidate, and Col. Tappan, another of the members, stated the evening previous to the election to one of the witnesses before the committee, that he and the other five gentlemen returned were candidates. On the day of election, previous to passing the vote fixing the number, it was stated about the house in conversation, that the expense of six would not exceed the full pay of two, and the bond was mentioned. After the vote for fixing the number was passed, some person, doubting the existence of the bond, called for it, and the chairman of the selectmen went to his house and brought it into the meeting, and it was read by the town-clerk, or one of the selectmen, publicly, previous to the ballot for representatives. When the bond was read, Mr. Parsons and Mr. Tucker, two of the sitting members, were present; and all the sitting members were frequently present during said meeting, except Mr. Manning; one of whom, Mr. Elwell, the year previous, signed an indemnity[1] of similar import with the bond alluded to.

The committee further state, that no other evidence, except what results from the foregoing state of facts, has been offered, that the sitting members had any agency respecting said

[1] The following is a copy of this document:—

Take Notice.—Considering the wants, sufferings, and privations, experienced by our countrymen for the last sixteen months, and sensible that those evils have flowed from the fatal policy and ruinous measures of our own rulers, and impressed with a thorough conviction that the democrats, through the state, are resolved to send the extreme number of representatives that the constitution will allow them, for the purpose of distracting, disorganising, and paralising our state legislature, and conscious that our fellow citizens of this town have been incalculable sufferers, we, the subscribers, jointly and severally, promise and engage, that if the federal republican ticket for six representatives prevail here, the expense of the representation of this town to our general court, the current year, shall not exceed that of two representatives.

William Coffin, Ignatius Webber, James Mansfield, Ebed Lincoln, William Dane, James Hayes, William Ingersoll, David Low, John Mason, Robert Elwell, 3d., Addison Plummer, Isaac Somes, Jonathan Brown, Jonathan Low.

Gloucester, 6th May, 1809.

N. B.—The above is a true copy from the original which is lodged with the selectmen. WILLIAM DANE, *Chairman.*

bond, or that the event of the election aforesaid was affected thereby.

The committee, considering all influence used in our elections, other than that which is addressed to the reason and patriotism of the electors, as in the highest degree dangerous to the safety of the state, and tending inevitably to subvert the freedom of elections, respectfully submit to the honorable house, their unanimous opinion, that the election aforesaid is void, and that Thomas Parsons, John Tucker, John Manning, James Tappan, John Johnson, and Robert Elwell, are not entitled to their seats."

This report was taken into consideration, and after debate, postponed to the next day, and, in the meantime, ordered to be printed with the accompanying documents.[1]

On the thirty-first of January,[2] the house again took up the report, and, after debate, Mr. Robinson, of Boston, moved to postpone the further consideration of the subject to the last Wednesday in May next, which motion was decided in the negative.

The previous question was then called for, and being put, was decided in the affirmative.

The main question, being on agreeing to the report, was then taken by yeas and nays, and decided in the affirmative, yeas, 224, nays, 125, including five of the members from Gloucester, who voted in the negative.

It was thereupon declared by the speaker, that the election of the members, returned as representatives from Gloucester, was illegal, and that their seats in the house were vacated.

Five of the gentlemen from Gloucester, namely, Messrs. Parsons, Manning, Tucker, Johnson, and Elwell, having voted in the negative, on the adoption of the report, it was ordered, that their names be erased from the roll of members who answered "No," when their names were called.

[On the next day, after the decision of this case, on motion of Mr. Sprague, of Salem, it was "Ordered, that no member be permitted to vote on the question of his right to a seat."]

[1] 31 J. H. 241. [2] Same, 246.

BELCHERTOWN.

Where an election was controverted on the ground of a deficiency of ratable polls, and the member neglected to furnish the petitioners with a list of those persons whom he considered as ratable polls, agreeable to the requisition of the committee on elections; the election was adjudged void, on *prima facie* evidence of the insufficiency.

Where three members were elected at separate ballotings in a town, which contained more than a sufficient number of ratable polls to entitle it to two, but not enough to entitle it to three, it was held, that the deficiency affected only the right of the member last chosen.

Committees of the house should return all papers with their reports.

The election of Eldad Parsons, the last chosen of the three members returned from the town of Belchertown, was controverted by Elihu Sanford and others,[1] on the ground, that the said town did not contain the requisite number of ratable polls, to entitle it to three representatives.

This case was referred[2] to the January session, at which time the committee on elections made the following report[3]:—

"The committee on elections beg leave to report, that the inhabitants of Belchertown did, in May last, elect three representatives by separate ballots, against whose election a petition was presented, at the last session of the legislature, on the ground, that said town did not contain 600 ratable polls. At the last session of the legislature, the petitioners produced proof that said town contained but fourteen school districts, and also depositions of fourteen persons, one in each school district, of the number of ratable polls in their respective districts. The aggregate of the numbers, in the fourteen districts thus shown, was 553. The petitioners, at the same time, exhibited a list of 553 names, corresponding with the depositions. As it appeared that the three representatives were chosen by separate ballots, the committee considered the result of their inquiry could only affect the right of Eldad Parsons, the member last chosen. They, therefore, required said Parsons to furnish the petitioners, within two months, with a list of all the persons whom he considered as ratable polls,

[1] 31 J. H. 55. [2] Same, 104. [3] Same, 295.

whose residence was in Belchertown, at the time of his election. They also required the petitioners, within two months after receiving said list, to furnish said Parsons with a list of such names as were on the list furnished them by said Parsons, and against whom they meant to object, as not being ratable polls. The said Eldad Parsons has not complied with the instructions of the committee, but wholly neglected them. Mr. Phelps, who appeared before the committee this session on his behalf, produced a list, containing 620 names, but without any evidence that a sufficient number of them were ratable polls, to authorise the town to send three representatives. The committee are of opinion, that it will be impossible to investigate controverted elections, unless the rules of evidence which they direct are complied with; and they are also of opinion, that, as said Parsons has wholly neglected to comply with their instructions, the evidence in the aforesaid depositions ought to be considered conclusive, and that said Eldad Parsons is not entitled to a seat."

On the fourteenth of February, a motion was made in the house,[1] by Mr. Sprague, of Salem, (chairman of the committee on elections,) that the papers relative to the Belchertown election be taken from the table, and delivered to the committee on elections; on the ground, that oral evidence and depositions are not admissible before the house, which must act upon the report of facts, as stated by its committee.

Mr. Whitman, of Boston, urged that the depositions and papers ought to remain on the table, as the property and for the use of the house.

The Speaker (Hon. Joseph Story, of Salem,) gave his opinion, that the papers ought to remain in the possession of the house.

Mr. Sprague explained, and said that he conceived that the depositions ought not to be used, as the oral evidence which explained them could not be introduced.

Mr. Davis, of Boston, thought that the depositions, and all the papers used by the committee, ought to be before the house; otherwise it could not correct the errors of judgment of its committee, nor their sinister intentions, if any they had.

Mr. Phelps, of Belchertown, wished the papers to be before the house, that he might have the privilege of examining them.

Mr. Davis said it was the duty of committees to lay all papers submitted to them before the house, when they make their report.

The Hon. Speaker, being called on, decided, that committees ought to return all papers with their reports.

Mr. Greene, of Berwick, appealed from the decision of the chair; not that he was against it, but because he wished the question settled. The decision of the speaker was supported, without opposition.

Mr. Sprague withdrew his motion, and the case was postponed from time to time,

[1] 31 J. H. 313, 314.

till Wednesday, February 20, at which time,[1] the order of the day was called for on the Belchertown election, and Mr. Phelps introduced a list of the ratable polls of Belchertown, certified by the selectmen, which, he said, differed in several instances from that furnished by the petitioners; that in one of the districts, called Hunting's, the list of the petitioners contained twenty-one less than the number belonging to it. He objected to the course pursued by the petitioners; individuals had been employed to take the number of polls in their respective districts, and had made out a list, which, at best, was very inaccurate; and these individuals had sworn to the numbers in their districts; and, though they may have stated what they believed to be the truth, they might have adopted different modes of estimating who were ratable polls. From the form of their depositions, it would seem, that they had excluded all those inhabitants of the town, who happened to be out of town on the first day of May. He was satisfied this must have been the case in Hunting's district, where there was so great a deficiency in the petitioners' list; and accounted for this deficiency, by observing, that this district was annexed to Greenwich, for parochial and military purposes; and that there was a training in that town, on the first of May, which called those liable to do military duty in Hunting's district out of Belchertown.

Here it was observed, that, on the statement of Mr. Phelps, the subject ought to be recommitted.

Mr. Sprague said that he conceived the report contained all the facts that were essential in the case, and that it was substantially true. The committee considered that the depositions raised a strong presumption against the election, and therefore required of Mr. Parsons to furnish the list, as stated in the report.

Mr. Webb, of Weymouth, said he saw nothing in the statement of Mr. Phelps, that ought to invalidate the report. The petitioners had, in his judgment, produced sufficient proof that there were but 553 ratable polls in the town. The committee then gave to Mr. Parsons a fair opportunity to furnish them with the list of ratable polls. This course he thought correct, and such as reflected honor on the committee. He conceived that, as Mr. Parsons had not furnished the list, required by the order of the committee, which he might so easily have done, the evidence ought to be conclusive against him, and his seat ought to be vacated, even if there were a thousand ratable polls in the town.

Mr. Fay, of Cambridge, said he was one of the committee, and that he did not concur in the report. He had no idea that this house have the right to set aside the election of a member, as void, for any misconduct after his election. This would be an infringement, not only on his rights, but, what was of more importance, the rights of the corporation that sent him. If the member from Belchertown had done anything that required it, let him be expelled, or dealt with as his misconduct, in the discretion of the house, may require. The question is—Had Belchertown 600 ratable polls? If it had, we cannot vacate the seat of its representative. He believed it had; and he was satisfied, from the statement of Mr. Phelps, and the papers that had been before the committee, that some, at least, of the deponents, had acted under, at best, a gross mistake; that it was evident that some of them excluded those persons, who happened to be out of town on the first day of May; that the form of the depositions admitted this construction in all of them, and afforded a shelter for the deponents, in taking their account in this manner; and that he believed this mode of proceeding, by the petitioners, would account for the deficiency of their list. For his part, he was

[1] 31 J. H. 350.

fully satisfied, that the list of ratable polls, certified by the selectmen, whose official duty it was to make it correct, ought to be received as the guide of the house in the case.

Mr. Dwight, of Springfield, thought that the subject ought to be recommitted.

Hon. Mr. Thatcher, of Warren, said the committee had adopted, in their report, a very untenable and reprehensible ground. That the real question was, whether there were a sufficient number of ratable polls, in Belchertown, to authorize its sending three members to this court? That the committee appeared, by the report, to have waived this question, and, with their "little brief authority," to have resolved themselves into a kind of court martial, and proceeded to try Mr. Parsons for misconduct, instead of inquiring into the merits of his election; and to report, that he should be disfranchised, not for being illegally chosen, but for disobedience of their orders.

Mr. Thatcher was called to order. The Speaker observed, that the course of his argument appeared to be leading rather to a trial of the committee than of the merits of the election; but as the committee had introduced their instructions into the report as an argument for vacating the seat of the member in question, he conceived the gentleman had a right to meet that argument.

Mr. Bangs, of Worcester, said, that in every question there are parties. He considered the member whose seat is contested as the party, and not the town. The petitioners ought not to be called upon to prove negatively, that there are not so many ratable polls, but the member to prove affirmatively. Is the certificate of the selectmen conclusive? If so, there is an end of the question, and any town may swell their representation as they please. But he believed the house had a right to go behind the return, to examine into facts and make any deductions that the case may require. Have the committee taken the proper course to make the inquiry? He thought they had. He put the depositions out of the case; the petitioners had nothing to prove. The objection to the course prescribed by the committee, he considered as groundless. The selectmen misconstrued the order. They were only required to give a list; not of those who happened to be in, or out of town, on the first of May; but of the *bona fide* ratable polls at that time on the list. There are polls not ratable above sixteen years of age: No exceptions are made in the certificate. It is not shaped so that any specific objection can be made to it, or any certain inference drawn from it; and therefore ought not to be received as a rule of action.

Mr. Davis said, that when he was first a member of this house, it was a rule, that the return of the selectmen should be conclusive, unless fraud could be shown; since which, a law has been passed, requiring the selectmen to make their returns under oath. It is now contended that the return of the selectmen, made under all these solemnities and formalities, has no binding force upon this house. There was, in his opinion, on the face of this report, the evidence of wicked proceedings in the transaction. Why were the depositions taken with reference to the first of May? Because there was known to be a training on that day, which obliged a number of ratable polls to be out of town. Upon these depositions the committee have undertaken to require the member to produce a list of ratable polls; when perhaps no two men would agree what is a ratable poll. What is the result of the report of the committee? That the member has not complied with their rules; not that they have proved his seat is vacated for want of a sufficient number of ratable polls. He was far from justifying a disobedience of the orders of the house or of their committees; but if members were guilty of such conduct, let them be proceeded against in the usual way; not by declaring their seats void *ab initio* for an offence after their election.

Hon. Mr. Bigelow, of Medford, rose to state a radical objection to the report, which

he thought subversive of every sound principle of our rights of representation. The committee go upon the ground, that the sitting member is bound to vindicate his right to a seat in the house, instead of requiring the petitioners to disprove the right of a member duly returned as such.

Mr. Sprague. — The committee have adopted in this case the rule that has been uniformly pursued.

Mr. Moody, of Saco, contended that the same principle was adopted in the case of West Springfield.

The question was then put; shall the report be agreed to? And there being 89 yeas, and 98 noes, it was not agreed to.

On the twenty-first of February,[1] Mr. Green moved, that the house reconsider the vote of yesterday, rejecting the report of the committee, on the Belchertown election, and stated his reasons. That the report was predicated on the same principles that were adopted in the Charlton election last year. He wished the question decided on the principles of truth, equity, and law. If Belchertown has 600 ratable polls, the member is entitled to his seat; if less, he is not. Does it appear that the town has this number, or not? It appears by proof positive, produced by the petitioners, that there were, at the proper and legal time of making the estimate, but 553 ratable polls in Belchertown. This evidence ought to be conclusive, till invalidated. An opportunity was given to the member to show, if the facts were so, that there were a sufficient number of ratable polls to make good his election. The committee could not have pursued a course more fair and liberal than they have in this case. The petitioners say, there are but 553 ratable polls. The town says, there are 600. The committee say to the sitting member, you must produce a list of what you consider ratable polls, within two months, that the petitioners may point out who are not ratable polls. If the member has not done this, he has not done his duty. Mr. Phelps, a gentleman for whom I have the greatest respect, produces a list containing 620 names, said to be above sixteen years of age; but this neither complies with the order, nor does it furnish proof that there are 600 ratable polls. He wished the question decided upon the simple principle of Belchertown having or not having 600 ratable polls. Not producing evidence that they have this number, ought to be considered as evidence that they have them not. This is precisely the same principle on which the Charlton election was decided. It was required of its member to furnish a list of a sufficient number of ratable polls to substantiate his right to his seat. The same principle was adopted in the case of Bradford, and ten days allowed to the petitioners to strike off those who were not ratable polls. Whether it be for a contempt of this house, or of its committee, or because it was not in the power of the member from Belchertown to produce a sufficient number of ratable polls, (which I believe to be the case,) I hold that his seat ought to be vacated.

Mr. Morris, of Springfield, moved, that the further consideration of the motion of Mr. Green, be postponed to the next session. For postponement, 81, against it, 151.

Mr. Bangs thought the judicial decisions of the house should be first attended to, and that it ought to proceed to correct an erroneous decision.

Mr. Davis.—It appeared to him that gross attempts had been made by the minority of this town, to defeat the rights of the majority. The principle, in this case, has been to take the number of ratable polls actually in town on the first of May, when it was well known that a considerable number of the militia were out of town; precisely

[1] 31 J. H. 358, 359, 360.

as though the case had happened in Boston, and the number of ratable polls in town should be taken on commencement day, when the greater part of its inhabitants attended that anniversary.

Mr. Sprague rose and stated, that the committee neither received nor gave any instructions on the subject of training; and the depositions referred, generally, to the ratable polls, without reference to their absence, on the first day of May, or on any other day.

Mr. Davis proceeded:—The committee have enjoined a duty on the member which they had no right to do. The question is not between the house and the member; but it is between the house and the people of Belchertown. If their representative has done any thing wrong, the house has a right to proceed against him for his misconduct The case of West Springfield has been cited. In that case, it was not enjoined on the member to furnish a list. It was granted to him as an indulgence, at his request, to give him an opportunity to explain what appeared doubtful.

Mr. Smith, of West Springfield, wished to correct a mistake of Mr. Davis. The fact was, the petitioners had no evidence, and asked the indulgence to bring proof. The member took the ground, that the petitioners must prove that there were not ratable polls enough; the committee said no, the member must prove there were enough.

Mr. Moody.—An objection has been made to taking the ratable polls on the first day of May; this has no weight. It is the day required by law for taking the polls. A minor who should be sixteen years old on the second day of May could not legally be taken as a ratable poll. He could not see what the odds was between a return of selectmen and a return by the deponents in this case. He saw no evidence, that any were omitted from the circumstance of their being out of town; and thought no man of sense would omit taking down men thus absent. He should think the number taken by fourteen men, who took it under oath, and with the knowledge of the inhabitants in their respective districts, was, at least, as likely to be correct as that of the selectmen. The member said, he had a right to his seat; the petitioners said, he had not. It has been the rule of this house, to go behind the returns. We are made the judges of the elections of our members. This cannot be done, without going behind the returns. It has been said, the committee have not the right to prescribe rules for procuring evidence: I must think they have this right; and that they have acted correctly in this case.

Rev. Mr. Foster, of Littleton.—I want further information of facts.

Mr. Phelps rose, and stated, that the selectmen of Belchertown considered every male inhabitant above sixteen, and not a pauper, to be a ratable poll.

Mr. Foster proceeded:—

If it be a fact that the fourteen men who took the district lists really did omit those who were out of town on training, it would be notoriously wrong; but I see no evidence of such a fact. I cannot think that any man would be so base.

The certificate of the selectmen was read from the chair, by request of Mr. Phelps.

Mr. Whitman.—It is important to take the constitution and the law and compare them together and see how they apply to the case.

The constitution does not refer the number of ratable polls to any particular day. The time not being fixed by the constitution, it must be fixed by expediency. Here men may honestly differ. Some take the day of election; others the first day of the month; others adopt a more liberal construction, and say, they will take one, two, or three months, to ascertain their ratable polls. It is therefore a question of expediency, left by the constitution to this house, to adopt a rule for the measure of time; and the towns, as our primary assemblies, have necessarily the same right; and we

are bound to respect their right. I ask gentlemen of this house, on what principle we can interfere with a rule adopted by a town, agreeable to the constitution, where no fraud appears, and set aside its returns? The selectmen of Belchertown come forward and lay before us the evidence taken under oath, and in fulfilment of their duty. I have always been of opinion, that this must be conclusive, and could not be impeached except for fraud. But the committee have admitted the evidence of fourteen men, who, I am willing to admit, acted honestly. They say, that on the first day of May, they found but 553 ratable polls.

How, then, if we take this as evidence, will it weigh against the certificate of the selectmen? What is the rule adopted by your courts, by all men of liberal upright minds? If there is a doubt remaining, it should preponderate in favor of the established order of things; in favor of him who holds possession of that to which he has a supposed right. Apply this rule to the present case, and I would ask, if we must not decide in favor of the honorable member's holding his seat, who is returned as legally and properly chosen? In doing this, we need impeach none of the evidence.

I apprehend the committee have exceeded their authority in their injunctions on the member. The committee have required Mr. Parsons to furnish evidence unknown to our laws, as stated in their report. They should have said to him, produce the evidence of your title to your seat; and left it with him to produce such as he should think proper, or such only as the law requires, and rejected any improper evidence, if offered. To prescribe and limit the evidence, is, in effect, prejudging the cause. I therefore apprehend that the committee have prescribed a rule illegal and improper.

Then what conclusion do they draw? That the member's seat should be vacated, because he has not complied with their order. Certainly this is going too far. Should not the member have even the liberty of appealing to this house?

Mr. Sprague rose to state facts. He was employed by the petitioners of Bradford; the committee ordered the members from Bradford to furnish a list of ratable polls; the petitioners agreed to furnish a checked list in ten days. The committee endeavored to follow the same principle in the case of Belchertown. They did not mean to make a rule for the house; but for their own proceedings.

Mr. Willis, of New Bedford.—The deponents swear to nothing more than their own districts. It is therefore no more than the evidence of one to the same fact, in effect; and ought not to weigh against that of the selectmen.

Mr. Bigelow.—I conceive the report to be bottomed on one of two principles; either that the proof of the number was not sufficient, or that it was weakened. If the proof is flung on the sitting member, we renounce all our rules of municipal law; we adopt the principle, that a man shall be held to be guilty till he is proved innocent. It has been suggested, that the member's seat ought to be vacated because he has not complied with the orders of the committee. This is too monstrous to be admitted.

The argument at the close of the report, that the committee could not ever get through with the business, has no weight. They should have pursued a correct principle, at all events. Duty is not measured by time. While the member has even a colorable title to his seat, he ought, upon every sound principle, to hold it.

The question is not, what he has proved, or omitted to prove; but, have the petitioners proved beyond a doubt, that there were not 600 ratable polls in Belchertown? Certainly they have not proved this. Every word they say may be true, and yet the member entitled to his seat.

A town may take the valuation for the purpose of assessing their town tax, when they please—the 7th of May if they choose—and fifty persons might be ratable polls

on that day, who were not on the first. There is an equivocation in the depositions, which makes them uncertain.'

I beg gentlemen to consider the consequence of considering the first day of May, for instance, as the time for taking the ratable polls. Is it not easy for a number of individuals to deprive a corporation of its right? Suppose, for instance, Salem; might not enough of the inhabitants leave the place to reduce the number of its representatives to six.

It has been decided, over and over again, both in the house, and in committees, that the day of the election (and not the first, or any other day of May,) is the day on which the number of ratable polls is to be taken, in estimating the number of representatives that any town is entitled to send to the general court.

The number of ratable polls in Belchertown has been taken on the first day of May, which happened, in this case, to be the day of general training throughout the state.

Mr. Bangs.—It appears to me that some are for making it a question, whether we shall ever sustain any petition against an election in this house hereafter.

I will suppose that there had been no committee, and that the inhabitants were before the house and alleged that the member was entitled to his seat; what more could we require of them than they have already done? They would only bring the evidence of individuals; the officers might be against them. Against this evidence could only be produced the return of the selectmen. They say their members are duly chosen. If we stop here we make the selectmen the conclusive judges. They may include minors but five years old; they may choose as many members as they please, and what can the petitioners do? It is said here, we have but presumptive evidence. I do not know what more this whole house could do than the committee have done. We could say, give us a list of names. Let us then hear the objections on one side and the other, and judge of the result.

Mr. Churchill, of Milton, said he had always understood, that the first day of May was the day, upon which the ratable polls of every town are to be counted. He never till now heard a contrary position maintained or suggested. He did not precisely like the form of the report. It was in part predicated on the number of ratable polls at the time of the election, and not on the first day of May. He thought the report ought to have been in a different form.

Mr. Dutton, of Boston.—I do believe that this report contains principles, which, if adopted, we shall have occasion to regret hereafter. The sitting members brought with them evidence that they were chosen, and that Belchertown had a right to send three members. The depositions, are in substance, the evidence of one man. On the other side we have that of the board of selectmen, which we have heretofore considered as conclusive. We ought then, at least, to be satisfied with it, till it is disproved, beyond all reasonable doubt. I go further. I consider it as binding in all cases, where no fraud appears. In one of the depositions there is a difference of twenty-one. This would not have been the case, unless those were omitted who happened to be absent on the first day of May. The language of the depositions and of the committee authorize this supposition. They might as well have required the number of those who were in town at 12 o'clock, on the first day of May. I have in my hands the certificate of the selectmen. This is all that the member was bound to produce. But what do the committee require? Their report is absurd. The member could only be considered as a member of this house: He was liable to no injunction of the committee.

Mr. Howe, of Sutton.—I had the honor of being one of the committee. We have adopted the rules that were adopted the last year, and sanctioned by the house. We thought them accurate, and therefore followed them. I will refer to the facts. What

did Belchertown do? [Here he read a deposition in the case, and called attention to the caption, in which it appeared, that the selectmen of Belchertown were notified to attend, but did not attend till it was completed. He read, also, the order of the committee and the return thereon; and enumerated instances of several on the list of the selectmen, that were proved not to be ratable polls.]

It is impossible that these fourteen persons should have gone on and taken the list of ratable polls on the first day of May, seven days before the town-meeting, and before it was known whether they would send one, two, or three members. The list was taken afterwards, and contains the names of the ratable polls in the several districts with reference to the first day of May.

Mr. Mills, of Northampton.—The question we have to decide is, whether Belchertown had a right to send three representatives? These representatives must be considered as entitled to their seats, unless the contrary be shown beyond all doubt. In comparing the evidence, which ought to weigh the most? The evidence of the deponents, or that of the selectmen, who may have assessed the polls liable to be taxed? Certainly the latter. There is another fact that corroborates the certificate of the selectmen: The committee were told, that there were names on the list of the selectmen, that were not on the list of the petitioners. If it is not shown that there were twenty or more of the list of the selectmen who were exempted from taxes the year before, that list stands unimpeached and conclusive in favor of the sitting member. There is one part of the report, to which I have weighty objections; that which recommends the member's expulsion, for non-compliance with the orders of the committee.

Mr. Ripley, of Waterville.—The principles which arise in this case are simple. The petition was committed in the usual course. The committee pursued a course chalked out by their predecessors in the house, for which they are not responsible. Why, therefore, should we be so capricious as to deviate from the precedents already established?

Mr. Davis asked if Mr. Ripley meant that any former committee had passed such an order as in this case, without the authority of the house, or a joint committee, for so doing?

Mr. Ripley proceeded:—

I have stated the former course, as I understood it to be stated, before, without contradiction. That, however, is not material.

The member in this case is the party, and Belchertown in the nature of a party. The committee directed the selectmen to furnish a list of ratable polls—a legal document which they had in their possession—and gave notice to those concerned. The selectmen did not furnish this evidence. It was therefore the duty of the committee, upon every principle of law, to presume that this evidence, if produced, would make against them.

Mr. Davis rose to state a fact. He referred to the order read before by Mr. Howe, and contended that a committee had no authority to make such order without the direction of the house; that their functions ceased when the house rose, and that the order in question was altogether supererogation and void.

Mr. Sprague rose to explain, and said, that two orders appeared in the case;[1] that

[1] June 14, A. D. 1810.—The committee on elections hereby give notice to Eldad Parsons, the sitting member from Belchertown, that he is to give to Henry Mellen, before the first day of August next, a list of ratable polls in the town of Belchertown, on the day of representative election in May last. Said Mellen is to furnish said Parsons with the names of the persons against whom the petitioners object, as not being

one only, that referred to in the report, was acted upon or had any thing to do with its merits; and that that was issued by the committee while the house was in session.

The Hon. Mr Thacher.—It was with great surprise that I perceived a motion to reconsider this question. I presume this is the result of concert. I fear some of us may vote with too little reflection. It is of extreme consequence that we adopt correct principles and adhere to them, especially as they are now to be reported and published as the rules of action for our constituents. It appears to me extremely clear, that we are bound to respect the returns of the selectmen, unless it can be clearly and specifically shown wherein they are wrong. The order of the committee was issued without authority. They acted in the recess without authority from the house; an assumption which I think deserves our censure. But to pretend that the member's seat ought to be vacated for not complying with this order, is monstrous.

Mr. Sprague rose and said, that the house gave a general order to their committee to send for persons and papers, and to sit during the recess in certain cases. The

ratable polls, before the first day of October next, and both parties are to be ready with their own evidence on the second day of the winter session.

By order of the committee on elections.

JOSEPH E. SPRAGUE, *Chairman.*

On the petition of Henry Mellen and others, against the election of Eldad Parsons, the third representative from Belchertown, and against his having the right to hold his seat in the legislature of this commonwealth, as a representative from said town, for the want of a sufficient number of ratable polls residing in said town on the first day of May, A. D. 1810, to entitle the said town to the third representative, as aforesaid:

Ordered, That the selectmen or assessors of said town of Belchertown furnish and deliver to Henry Mellen, or Elihu Sanford, the agents of said petitioners, on or before the fifteenth day of November next, a list of all the ratable polls, with their christian and surnames written at full length, constitutionally resident in said town on the first day of May last past; and the said Henry and Elihu shall, on or before the fifteenth day of December next, furnish to the said selectmen or assessors, or to either of them, the names of those to whom they object, and shall contend that they had no right to be considered as ratable polls, before the committee on elections.

The said Henry Mellen is hereby directed to serve this order, by leaving with one of the said selectmen or assessors of said town, and with Eldad Parsons, a copy of the same, on or before the fifteenth day of October, now next, and cause this order, with his doings therein, to be returned to either of the subscribers, on or before the third Wednesday of January next.

ESTES HOWE,
JOHN NEVERS,
ABRAHAM LINCOLN, } Committee on Elections.

Boston, June 5th, 1810.

HAMPSHIRE, ss. *Belchertown, October 15th*, 1810.—Then I delivered to Wright Bridgman, one of the selectmen of Belchertown, a copy of the within order, and at the same time I delivered to Eldad Parsons, a copy, in compliance with the order of the committee within named.

Attest, HENRY MELLEN.

HAMPSHIRE, ss. *January 18th*, 1811.—This may certify, that the selectmen or assessors have neither of them ever furnished us with any list of the ratable polls with their christian and surnames, constitutionally resident in the town of Belchertown, on the first day of May last, nor have they to our knowledge paid any attention to the within order.

Attest, HENRY MELLEN,
ELIHU SANFORD.

order of the house was read from the chair and authorized the committee to "send for persons and papers."

Mr. Thatcher proceeded:—

I say, that when Mr. Howe or any other person undertakes to send round papers, as in this case, they are altogether void. I say, sir, the committee have totally transcended their powers. We have no right to vacate the member's seat for any disobedience to such orders as the committee have given. But how stands the evidence in this case? We have the return of the selectmen before us, which ought to be conclusive.

Mr. Brown, of Boston.—I believe, sir, if we establish this case as a precedent, we shall do something that we shall be sorry for.

If we are to set the assertions of individuals against the legal returns of the selectmen, we shall adopt a very erroneous principle. I do not blame the committee, but I do hope we shall not reconsider this question; and upon evidence, at least doubtful, establish a very dangerous precedent.

Mr. Dutton.—Is it incumbent on the member to prove anything, when the selectmen have furnished a list as in this case, which shows that there were ratable polls enough to establish his right? It has heretofore been enjoined on the petitioners to disprove the member's right to his seat. The committee say, because the member has not complied with the order and done in a limited time what he has since done by producing this list, that his seat shall be vacated. This is making a question of etiquette, not of right.

Mr. Crosby of Billerica.—It is observed that it is uncertain what are ratable polls. I think it probable that the deponents included in their list only the *rated* polls. Besides, the 553 polls were taken by a party; and I think more confidence due to the selectmen, than to volunteer organs of a party. The census has since been taken, and by one not a friend to Mr. Parsons; it gives 612 males, above sixteen years of age.

Mr. Green.—I should not have risen again, had it not been for the extraordinary course this debate has taken. I shall give my vote in the affirmative with as much pleasure and pride as any man can in the negative; not because the member has not complied with any order of the committee, but because I do believe that there were not six hundred ratable polls in Belchertown; and because I do believe that Mr. Parsons would have produced proof that there were this number, if the fact had put it in his power.

Mr. Phelps.—Two years previous to this the selectmen were called upon to produce a list of ratable polls. They did, of above 600 ratable polls, and sent three representatives accordingly; since which the selectmen have been changed; but last year they went on in the same way, and I have no question they were right in both cases.

Mr. Sargent, of Boston.—The idea of taking the ratable polls on a particular day is monstrous. Consider what would be its effect on our fishermen, of whom a great portion are absent from their homes a part of the time. Nor do I believe that the gentlemen are correct, who assert, that they must be taken on the first day of May. I conceive the only question to be, has the town of Belchertown 600 ratable polls? No man will deny that we ought to pay great respect to the constituted authorities, or agree that it ought to be set aside except for fraud or gross errors. As has been said before, the depositions give but the evidence of one man; any one or more might have made a mistake. I will adduce the case of the controverted election of Mr. King, now a member of the honorable senate.

Mr. Sargent proceeded, and stated in substance, that in this case, where he had the honor of being on the committee, the report was, that Mr. King's election ought to

be set aside, it being proved to the satisfaction of the committee, that in fact, he had not a majority of votes, by one; but that the house, disposed to respect the return of the selectmen, and considering if they went behind the return, there were some doubts, which, while they existed, operated in favor of the member being duly returned; rejected the report, and admitted his right to his seat.

The question of reconsideration was then put: There were, for reconsidering yesterday's vote, 158, against, 86. The question was then put: Will the house agree to the report of the committee? And the yeas and nays were called for. There appeared, yeas, 158, nays, 86. And the speaker declared that "the seat of Eldad Parsons was vacated."

To this decision, the minority entered their protest, which is recorded on the journal, as follows:—

"The undersigned, members of the house of representatives, impressed by a sense of the obligations imposed upon them faithfully and impartially to discharge their duty, and to the utmost of their power to protect and defend the rights and privileges of the people of this commonwealth, as secured to them by our most excellent constitution; and believing the elective franchise among their first and most essential rights, a right which cannot be violated without the destruction of civil freedom, and the subversion of the genuine principles of a republican form of government; have witnessed, with equal astonishment and regret, the report of the committee on elections upon the election of Eldad Parsons, Esq., one of the members from Belchertown, the proceedings thereon, and a vote of the majority of this house, passed the 21st instant, agreeing to said report, and vacating the seat of said Parsons in this house.

Fully convinced, that said proceedings and vote were not warranted by the evidence exhibited, were an infringement of the rights of the said town of Belchertown, and a violation of the privileges of said Parsons, the undersigned are compelled most solemnly to protest against the same, for the following reasons, to wit:—

1st. Because the said majority, by their said vote, admitted the depositions of individuals in said town, having no official responsibility, to contradict and set aside the regular certificates of the assessors and selectmen, as to the number of ratable

polls, although the certificate of the said selectmen was accompanied by a list of 620 names of persons, certified by them to be males over the age of sixteen and resident in said town, and although it appeared by other evidence, that many persons were omitted on the list furnished by the said deponents.

2nd. Because the said committee on elections, at the last session of the legislature, issued their order to the said Parsons, directing him within two months, to furnish the petitioners against his election with a list of those persons whom he considered ratable polls resident in said town at the time of his election; which said order was issued without the sanction, direction, or knowledge of this house, and therefore not obligatory upon said Parsons.

3rd. Because it further appeared in debate, that Estes Howe, Esq., a member of said committee, during the recess of the legislature, and while the functions of said committee were of course suspended, at the instance of one of the petitioners, made and issued an order to the selectmen or assessors of said town of Belchertown, directing them to furnish and deliver to Henry Mellen or Elihu Sanford, the agents of said petitioners, a list of all the ratable polls in said town on the first day of May last, which said order purported to be dated at Boston, June 5, 1810, at which time the legislature was in session; although the said order was in fact issued at a period long subsequent to said session, and made by said Howe, at his office, in Sutton, in the county of Worcester; and by him sent to Abraham Lincoln, Esq., of Worcester, in said county, and to John Nevers, Esq., of Northfield, in the county of Hampshire, two other members of said committee, who separately signed the same. This proceeding, the undersigned are persuaded, is unparalleled in the annals of the commonwealth, is an assumption of arbitrary power, dangerous to the liberty of the citizen, and subversive of the rights guaranteed by the constitution.

4th. Because the said committee by their report, and the said majority by their vote accepting the same, have assumed the right to vacate the seat of said Parsons, for not complying

with the rules of evidence, and the arbitrary instructions prescribed by said committee, thereby admitting the dangerous and alarming principle, that a town may be disfranchised, and a member of this house deprived of his seat, although the town in their election may not have exceeded the number of members to which they are constitutionally entitled, and although the house have made no inquiry into the supposed neglect or default of said member.

Influenced by these considerations, the undersigned feel themselves imperiously called upon, by the duty they owe to their constituents, by their regard to their own rights, by their inviolable attachment to that form of government, under which they have heretofore enjoyed so much safety and happiness, and by their ardent desire to perpetuate the same, to make their deliberate protest against the said report, and the proceedings and vote thereon; and request that the same may be entered on the journal of this house."

RULES CONCERNING CONTROVERTED ELECTIONS.

On the twenty-eighth of February, 1811, the following resolution was adopted:—

Resolved, that in all cases of controverted elections, in the house of representatives, the following rules shall be observed:

1. No petition, against the election of any member, shall be received by the house of representatives, after the first session of any general court.

2. No petition, against the election of any member, shall be sustained or committed in the house, unless at the time of presenting the same to the house, the said petition be accompanied by evidence that a copy of the same petition has been given to some one of the selectmen of the town, whose elective franchise is affected thereby, and the person or persons elected, or left at their several last and usual places of abode, ten days at least, before the petition shall be presented to the house.

3. All questions on elections shall have a priority in the house, to all other questions, and may be at any time called up by any member of the house.

4. The facts stated by the committee on elections, in their reports to the house, shall be considered as the only basis upon which the determination of this house, on controverted elections, shall rest, and all extraneous matter not included in such report shall be excluded.

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, ON THE QUESTION, WHETHER ALIENS ARE RATABLE POLLS.

The polls of aliens may, within the intent of the constitution, be ratable polls, when made liable by the legislature to be rated to public taxes.

The polls of male aliens, above sixteen years of age, are now (1811) ratable polls, within the meaning of the constitution.

Ratable polls of aliens may constitutionally be included in estimating the number of ratable polls, to determine the number of representatives any town may be entitled to elect.

The right of sending a representative is a corporate right, and if a town vote not to send, an election cannot be made by a minority dissenting from that vote.

The legislature may, by law, establish what shall or shall not be ratable polls, upon which to predicate representation; the designation thereof being left, by the constitution, to the discretion of future legislatures.

On the sixth day of February, 1811, the following order was passed:—

"Ordered that the justices of the supreme judicial court be requested, as soon as may be, to give their opinion on the following question:—

Whether aliens are ratable polls within the intent and meaning of the constitution of this commonwealth?—and whether the towns in this commonwealth, in ascertaining their number of ratable polls, in order to determine the number of representatives they are entitled to send to this house, can constitutionally include in that number aliens resident in said towns, and predicate a representation on such resident aliens?—and, whether such representation can constitutionally be predicated

on the number resulting from the including, in the number of ratable polls, aliens resident in any towns within this commonwealth, and taxed, and paying taxes therein?"

On the sixteenth, the following opinion was received by the speaker, and by him communicated to the house:—

"To the speaker of the honorable house of representatives of the general court of Massachusetts.

SIR,—The undersigned, justices of the supreme judicial court, have considered the several questions, proposed to them by an order of the house, passed the 6th of February instant.

Before we advert to those questions, some general remarks on the constitution, and on some rules by which its construction is ascertained, may illustrate the reasons of our opinion.

From the manner, in which the department of legislation is formed, two questions may arise: one relating to the qualifications of the electors;—and the other relating to the apportionment of senators and representatives among the senatorial districts, and among the towns.

The elector of a senator must be an inhabitant of the senatorial district, in which he votes; and the elector of a representative must have resided one year in the town, before he can there be a voter. But an alien may be an inhabitant of a district, because he may there dwell, or have his home; and he may have resided in some town more than a year.—Can therefore an alien be a legal voter for a senator or representative?

Before this question is answered, we shall explain the principles on which the answer will be given.

The constitution is law, the people having been the legislators; and the several statutes of the commonwealth, enacted pursuant to the constitution, are law; the senators and representatives being the legislators. But the provisions of the constitution, and of any statute, are the intentions of the legislature thereby manifested. These intentions are to be ascertained by a reasonable construction, resulting from the application of correct maxims, generally acknowledged and received.

Two of these maxims we will mention:—That the natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature: unless the intention, so resulting from the ordinary import of the words, be repugnant to sound, acknowledged principles of national policy.—And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles: unless the intention of the legislature be clearly and manifestly repugnant to them. For although it is not to be presumed, that a legislature will violate principles of public policy, yet an intention of the legislature repugnant to those principles, clearly, manifestly and constitutionally expressed, must have the force of law.

In consequence of the application of these maxims, similar expressions in different statutes, and sometimes in the same statute, are liable to, and indeed do receive, different constructions, so that the true intent of the legislature may prevail.

Now we assume, as an unquestionable principle of sound national policy in this state, that, as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is therefore to be presumed that the people, in making the constitution, intended that the supreme power of legislation should not be delegated, but by citizens. And if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions, which are not to be misunderstood.

But the words "inhabitants" or "residents," may comprehend aliens; or they may be restrained to such inhabitants or residents, who are citizens; according to the subject matter, to which they are applied. The latter construction comports with the general design of the constitution. There the words "people" and "citizens" are synonymous. The people are declared to make the constitution for themselves, and their

posterity. And the representation in the general court is a representation of the citizens. If therefore aliens could vote in the election of representatives, the representation would be not of citizens only, but of others; unless we should preposterously conclude, that a legally authorized elector of a representative is not represented.

It may therefore seem superfluous to declare our opinion, that the authority given to inhabitants and residents, to vote, is restrained to such inhabitants and residents as are citizens.

This construction, given to the constitution, is analagous to that given to several statutes.—Creditors may levy their execution on the lands of their debtors, and hold them in fee simple, unless redeemed. Although the words of the statute are general, yet they are not deemed to include alien creditors. If they were so deemed, then under color of a judgment and execution, the rule of the common law, prohibiting an alien from holding lands against the commonwealth, would be defeated. So a general provision is made for the dower of widows; yet it is not supposed that a woman, who is an alien, can claim, and have assigned to her, dower in the lands of her deceased husband.

We now proceed to consider the constitution as relating to the apportionment of representatives among the towns, and of senators among the senatorial districts.

The right of sending representatives is corporate, vested in the town; and the right of choosing them is personal, vested in the legal voters. Because the right of sending a representative is corporate, if the town, by a legal corporate act, vote not to send a representative, none can be legally chosen by a minority dissenting from that vote. This corporate right is also a corporate duty, for the neglect of which a fine may be assessed and levied upon all the inhabitants liable to pay public taxes.

The number of representatives, which each town may send, depends on the number of ratable polls in the town; with the exception of towns incorporated before the making of the constitution, who may send at least one representative. The

rule of apportionment therefore does not depend on the number of legal voters, all of whom must be of full age; whereas the polls of minors, above the age of sixteen years, were ratable at the establishment of the constitution. What polls are, or are not ratable, are not designated by the people; they having left the designation to the discretion of future legislatures. And when the general court has by law declared what polls are ratable, all those polls are to be deemed ratable polls in the respective towns, in which they dwell.

A question therefore arises, whether the legislature can constitutionally provide, that the polls of aliens shall be ratable.

If by this provision aliens would acquire any political rights, to the diminution of the rights of citizens, we should for the reasons before given strongly incline to believe, that the legislature were restrained from making this provision. For as the political rights, arising under the constitution, are manifestly the rights of the citizens, the language of the constitution ought to be so construed, if practicable, that these rights should not be diminished, by sharing them with aliens. But without deciding what municipal, parochial, or corporate rights, aliens may, by the equity and benignity of the laws, acquire in consequence of their paying public or other taxes on their chattels, real or personal, or on their polls; it is extremely clear, that by such payment they acquire no political rights whatever. Whether their polls are, or are not ratable, they are not qualified voters for senators or representatives; nor can they be qualified to hold either of those offices.

No reasons have occurred to us, to restrain the power of the legislature from making the polls or the estates of aliens ratable; for the only limit to that power, under the constitution, is an exercise of it repugnant to the constitution. We have observed, that the political rights of the citizens are not affected by the exercise of that power; and we may observe, that it is the interest of the citizens, that it should be exercised in obliging aliens to contribute their reasonable proportion towards defraying the expenses of the government. As aliens residing among us receive the protection of the common-

wealth, and are secured in the fruits of their labor, and in the acquisition of goods and chattels, this contribution may be exacted, as a reasonable price of this protection and security, And when an alien is obliged to pay no other tax on his poll and estate, than is required from a citizen, having equal personal ability and estate, he cannot complain that the assessment is inequitable.

Before we can answer directly the question submitted to us, we are obliged to inquire, whether the polls of aliens are at this time by law ratable. By the last public tax act, the assessors of each town are required to assess all the male polls, above the age of sixteen years, within their respective towns, including negroes and mulattoes; with the exception of the president of Harvard College, and some other descriptions of persons, in which aliens are not included. The words are general, and according to their common usage extend, as well to the polls of aliens, as of citizens, who are above the age of sixteen years; and for the reasons we have given, we are not authorized so to restrain them, as to deny to the legislature the right of making the polls and estates of aliens ratable, or to refuse to the citizens the privilege of demanding from aliens a reasonable contribution towards the public charges.

If it should be asked, whether the poll of an alien may not be considered ratable, for the purpose of obliging him to pay a public tax, and not be considered ratable for the purpose of ascertaining the political rights of the town, in which he may live?—we should declare, that we know of but one purpose, for which a poll is ratable, which is making it subject to a capitation tax. If it is so subject, it is a ratable poll within the constitution. And if any town, incorporated since the constitution was established, contained one hundred and fifty ratable polls only, including the ratable polls of aliens within it, it would be competent for the legislature to impose a fine on this town, refusing to send a representative, for the breach of such political and corporate duty.

As senators are apportioned among the senatorial districts, in proportion to the public taxes they respectively pay, we can-

not distinguish between the ratable poll of an alien, operating in the apportionment of representatives among towns, and the public tax paid by an alien, operating in the apportionment of senators among the senatorial districts. And in making this last apportionment, it is not an object of inquiry, whether a part of the public tax any district has paid was assessed on, and collected from the polls of aliens.

We request the indulgence of the honorable house for having considered the subject so much at large. Perhaps it was unnecessary; but it was done for our own sakes, clearly to explain the reason, that while we admit the general rule, that words, in any legislative act, are to be construed according to the common usage; yet that there are cases, in which their import may be enlarged or restrained, to express the real intention of the legislature, which, when ascertained, is the law resulting from the act. Thus we have restrained the general import of the words "inhabitants" and "residents," used in some parts of the constitution, to inhabitants and residents who are citizens; that we might not unnecessarily fix on the people an intention of imparting any of their rights of sovereignty to aliens: and at the same time we have used the words "ratable polls" according to their common acceptation, as there is no principle of construction authorizing us to deviate from it, by denying to the legislature the right of making the estates and polls of aliens ratable. For the taxes, assessed on the polls and estates of aliens, have no effect on their political rights, but merely influence the apportionment of representatives among the towns, and of senators among the senatorial districts; in which apportionments aliens have no interest or concern.

We now respectfully submit to the honorable house our opinion, formed after the best deliberation we have given the subject;—and it is our opinion—

That the polls of aliens may, within the true intent and meaning of the constitution, be ratable polls, when and so long as they are made liable, by any legislative act, to be rated to public taxes.

That the polls of male aliens, above the age of sixteen years, are now by law liable to be rated to public taxes, and now are ratable polls, within the intent and meaning of the constitution; and, consequently,

That the several towns in the state, in ascertaining their number of ratable polls, in order to determine the number of representatives they are entitled to send, can constitutionally include in the number of their ratable polls, the polls of aliens, residing in their towns respectively, by law ratable to public taxes, and predicate a representation thereon, which will be a constitutional representation.

(Signed) THEOP. PARSONS.
SAMUEL SEWALL,
ISAAC PARKER.

1811—1812.

COMMITTEE ON ELECTIONS.

Messrs. *Eleazer W. Ripley*, of Waterville,[1] *Estes Howe*, of Sutton, *Charles Davis*, of Boston, *Joseph E. Sprague*, of Salem, *Edmund Dwight*, of Springfield.

REPORTER.

David Everett, Esq., of Boston.

[1] Mr. Ripley was chosen speaker, upon the resignation of the Hon. Joseph Story, at the January session. The committee on elections, during the investigation of the case of *Rehoboth*, as appears by a memorandum on the report therein, was composed of Messrs. *Charles Davis*, of Boston, *John Nevers*, of Northfield, *Benjamin Greene*, of Berwick, *Christopher Webb*, of Weymouth, and *Edmund Dwight*, of Springfield.

LANESBOROUGH AND NEW ASHFORD.

Where a town and district, or two towns, are united, by an act of the legislature, for the purpose of electing representatives, the certificate of a member must be signed by a majority of the selectmen of both, or it will be void:—If, in such case, it be proved, that the selectmen of one improperly refused to sign the certificate, the house has power, by the general provision of the stat. 1795, c. 55, § 1, to give validity to any certificate, which shall be "to their acceptance."

The committee on the returns, having reported that the return from Lanesborough and New Ashford was certified by the selectmen of the latter town only:[1] it was thereupon ordered, that the committee on elections inquire into the propriety and regularity of the said return, and examine the law by which those towns are authorized to send representatives. The committee were also directed to notify the member purporting to be returned, to attend them in the investigation of the subject.[2] A petition of the town of Lanesborough, against the said election, was also received, and referred to the committee.[3]

On the twenty-seventh of June, the committee reported the following statement of facts[4]:—

"The town of Lanesborough was an incorporated town previous to the adoption of the constitution, and, of course, by the provision of that instrument, was entitled to send a representative to the general court. New Ashford was erected into a district in the year 1781, and was invested with all the rights of an incorporated town, 'that of sending a member to the general assembly only excepted,' but liberty was given them to join with Lanesborough for that purpose.

Without expressing their full opinion of the operation of this annexation, the committee will only say, that in their view, a new corporation for the purpose of sending a representative was thereby created, formed of two which in every other view were perfectly distinct: and although Lanesborough might retain its sole right under the constitution of sending a member, in case New Ashford refused to co-operate

[1] 32 J. H. 40. [2] Same, 63. [3] Same, 103. [4] Same, 165.

with them for that purpose; yet when it did co-operate, there can be no doubt, that the two political bodies became blended, and formed into one, for the purpose of choosing a representative. The question then arises, how, under the statute of February 24, 1796, entitled 'an act regulating elections,' is the return of a member, chosen by this new corporate body, to be certified? Provision is therein made, that, in every corporate town, the selectmen, or the major part of them, shall call meetings, shall preside, and make return of the members elected. If, then, for the purpose of choosing a representative, Lanesborough and New Ashford are to be considered as one corporate body, it would follow, of course, that a return, in order to be according to the forms of the above mentioned statute, must be signed by a major part of the selectmen of the two component parts of the corporation mingled and formed into one, for the single purpose of choosing a representative.

It may here be asked, whether, in case a member were fairly and legally chosen, and the selectmen of Lanesborough refused to sign his certificate, what remedy could he have? To this it may be answered, that if proof were given of such refusal, the legislature are by the statute above cited invested with discretionary powers, to give validity to any certificate which 'should be to their acceptance.' Of course they have all the necessary powers, to correct any improper proceeding, on the part of selectmen.

In judging on the face of the return, the committee can have no hesitancy in saying, that it is insufficient because signed only by the three selectmen of New Ashford, who do not form a majority of the selectmen of the corporations of Lanesborough and New Ashford. But, if proof were to be offered, that the selectmen of Lanesborough had improperly refused to sign, it would be in the power of the legislature, under their general discretionary powers, imparted by the above recited act, to give to it validity and efficiency. And the committee would observe, that a petition against the seat of the sitting member has already been committed to them, and, on a hear-

ing of that petition, they should be better enabled to judge of the case. Under these circumstances, they submit it to the house to decide as to them may seem proper."

The report was agreed to, and, on the twenty-seventh of January, in the next session, a motion was made, that the house do vote the seat of the member from Lanesborough and New Ashford, to be vacated. This motion was subsequently taken up, and after debate thereon, the following vote was passed, namely:[1]—

"It appearing by the report of the committee on elections, made at the last session, that the certificate produced by the sitting member from Lanesborough and New Ashford was insufficient, therefore,

Resolved, That the seat of the said member be declared vacated."

REHOBOTH.

Notice of town-meeting.—Illegal and improper conduct of presiding selectman, in restraint of the freedom of elections.—Election void.

THE election of Elkanah French, Caleb Abell, John Medbury, Sebra Lawton, and Timothy Walker, members returned from the town of Rehoboth, was controverted by Stephen Bullock and others, on the ground of improper conduct on the part of the selectmen of the said town, at the meeting therein for the choice of representatives.[2]

The facts in the case are stated in the following report of the committee on elections, made on the fourteenth of February, in the second session,[3] namely:—

"The committee on elections, in the case of the petition of Stephen Bullock and others, inhabitants of the town of Rehoboth, against the election of the members returned from said town, report, that they find, that on the thirteenth day of May, now last past, a meeting of the inhabitants of the town

[1] 32 J. H. 273. [2] Same, 47. [3] Same, 320.

of Rehoboth was holden, in pursuance of a warrant issued fourteen days before, for the choice of one or more representatives to the present general court; that at this meeting, motions were made, seconded and put, in order to obtain a decision on the questions, whether the town would send one representative, or five representatives; that the votes appeared to be so equally divided at the first trial, that the selectmen declared, they could not decide on which side was the majority; that afterwards it was agreed, that each voter in favor of sending five should take by the hand a voter in favor of sending one, and march out of the house; and Captain Cushing and Mr. Thomas Kennicut were appointed to count the files, and determine the question upon an inspection of those, on either side, who should be without partners; that after the said two gentlemen had counted two hundred and ninety-eight files, they were interrupted by Elkanah French, Esq., who told them it was impossible to decide the question, in that mode, it being evident, as he said, there was a mistake; that the question was not understood, for he saw 'republicans' on the side for sending one. It was observed by Capt. Cushing in reply, that there could be no mistake; that they had already counted off five hundred and ninety-six, with correctness, and that in a few minutes the counting would be finished, and a decision made; but Mr. French persisted in his interference, took Capt. Cushing aside, and they were in conversation for some time. In the meanwhile, many voters, thinking the counting was finished, left their places, and went into the meeting-house to hear the result declared, and, shortly after, all the others followed. The selectmen, on being called upon to declare the result, observed that they could not decide, for the counting was not completed. It appears that there were from fifteen to twenty-five persons without partners, and that these fifteen to twenty-five constituted the majority for sending one representative; but whether this fact was known by the selectmen, the committee cannot determine. After these ineffectual attempts to obtain a decision on either question, of sending one or five, it appears, that a motion for dissolving the

meeting, and a motion for its adjournment to Saturday, the eighteenth day of the same May, were regularly made and submitted to the freemen for their decision. On the house being polled, the selectmen declared that there were three hundred and thirty-one for dissolving the meeting, and three hundred and twenty-seven for adjourning until Saturday, and there being a majority of four for dissolving the meeting, it was dissolved accordingly.

The committee further find, that on the next day, (to wit, the 14th of the same May,) the selectmen, upon a petition signed by fifteen inhabitants, issued their warrant for a town-meeting, to be holden on Saturday, the 18th day of the same month, at 12 o'clock, noon, at the east meeting-house, for the purpose, as expressed in the warrant, of sending one or more representatives to the general court; the notifications to that effect were given verbally, or by reading copies of the warrant, by the constables, to the inhabitants they found at home, or met in the highways; and when an officer did not find a voter at his home, and had not met him elsewhere, he stated verbally the purpose and time of the meeting to the wife or other person or persons he found at the domicil of the qualified voter. It appears that notifications were not posted at the meeting-houses, and no public day intervened, from the issuing of the warrant until the time of the meeting. The committee also find, that the uniform manner of calling town-meetings in Rehoboth, for fifty-two years last past, has been by posting notifications, at each meeting-house in said town, so long before the intended meeting, as to have two public days intervene between the time of posting up the notifications and the time of the meeting, and that this mode was never deviated from, until the present instance.

The committee further find, that, at the meeting on the 18th of May, immediately after the petition and warrant were read, a motion was regularly made and seconded, that the town should send one representative, and no more; and immediately following this motion, another was made and seconded to send five; that Elkanah French, Esq., (the presiding select-

man at this meeting,) declared, in a loud voice, as follows: 'I will hear none of your motions, and I will put none of your motions; I will manage this meeting according to my own mind. If you do not like my proceedings, or if I do wrong, prosecute me. Bring in your votes for from one to five representatives.' That at the time the first motion was made, or the instant before, a voter put his ballot into the box; and this voter swore to his belief that his vote was in, the moment previous to the first motion being made.

The committee further find, that the meeting was unusually orderly and quiet, until the declarations of refusal to put motions were made by said French, as aforesaid; that, consequent upon those declarations, much confusion and tumult ensued, some insisting that the motions should be put and decided, before any votes were received; others insisting upon voting, and others that they should not vote; and in some instances, personal contests arose between the voters, and blows were given; that the selectmen ordered one person, who appeared to them to be the most riotous, to be carried out of the meeting by the peace officers, and he was by them carried out, without any resistance being offered them, excepting that made by the individual himself; that most of the tumult and confusion was immediately in front of the seat of the selectmen; that the presiding selectman repeatedly called for order, and declared, unless there was order, he would turn the box in five minutes; that for a short time after the tumult commenced, the noise was so great, it was with difficulty that either the moderator or any other person could be heard.

The committee also find, that when six or eight ballots were in the box, a motion was made and seconded for an adjournment of the meeting for half an hour, and reasons in support of the motion were assigned to this effect: 'that it was evident there was much agitation and confusion in the meeting, caused by the refusal to put the former motions; that the question, how many representatives the town would send, had, at all previous town-meetings, been submitted for decision to the freemen, as a matter of course; that a refusal in this in-

stance was altogether unexpected, and considered by many as a gross infringement of the rights of the people, and that an adjournment for a short period would give opportunity for tumult to subside, passion to cool, and the electors to vote with regularity.' This motion also was, by the said Elkanah French, utterly refused to be put;—he declared he would not put it, and ordered the mover to sit down, and hold his tongue.

The committee further find, that the presiding selectman ordered the aisles to be cleared, and repeated his calls for order, and for votes to be brought in; and that he ordered the voters to come up the western aisle, vote, and then to go down the eastern aisle. They also find, that the manner of voting of the electors at the east meeting-house has uniformly, for twenty-two years, been, to come up the eastern aisle, vote, and then go down the western aisle; that consequently the eastern aisle was very much crowded with voters, who were there in the expectation of passing up that aisle, voting, and of going down the western, as usual; that when the order was given to go down the eastern, and come up the western aisle, six or eight, who had voted, endeavored to force themselves down the eastern aisle, and formed a phalanx at its head, which contributed to the confusion.

The committee further find, that, after the presiding selectman had received a few ballots, Nathaniel Browne, Esq., one of the selectmen, declared the town had a constitutional right to send six representatives; that upon this declaration, the said French turned the votes, then received, out of the box upon the table, and ordered the voters to bring in their votes for from one to six representatives; that after the voting had proceeded for a short time, under the last order, the said French took up the votes which had been turned out, and returned them to the box, and they were counted with the others.

The committee further find, that after the order was given as aforesaid, to bring in votes for from one to six representatives, votes, to the number of six or seven, were received by

the selectmen, and deposited in the ballot box, which votes were not received directly from the hands of the voters, but were collected by one Thomas Bowen, (after he had himself voted,) from persons in the crowd, and were by him delivered to the aforesaid Nathaniel Browne, who put them into the box; that in other instances, votes were passed from hand to hand, over the heads of voters, until they arrived at, and were deposited in, the ballot box.

The committee further find, that the votes of five or six qualified voters were, by them, offered to the presiding selectman, and were by him refused to be received; that in most of these instances no reasons were assigned for the refusal; in one instance, he assigned as a reason, that he was about turning the box, and that he would not receive any more votes; but after he had thus said and thus refused, he did receive the votes of three persons, other than those he had refused as aforesaid; and then turned the box and made declaration, that the whole number of votes was twenty-five; that Caleb Abell, John Medbury, Sebra Lawton, Elkanah French, and Timothy Walker, had twenty-three votes, and were chosen, and that Peter Hunt had two votes; and then left his seat, and immediately Nathaniel Browne, Esq., one of the selectmen, made declaration, that all the above six were elected, and the meeting was dissolved.

The committee further find, that at the time the box was turned, the tumult and confusion had, in some degree, subsided; that no assault or personal violence was made upon nor offered to any of the selectmen, either in going to, or returning from the meeting; and that the authority vested in the selectmen by the constitution and laws, was not wrested from them during the meeting.

The committee also find, that at the meeting, and while the selectmen were calling for and receiving votes, the leaf of the table of the deacon's seat was violently broken down, and the breast work of the pew pressed in towards the selectmen, and blows were aimed over the heads of some persons at the presiding selectman, which in the opinion of the witness,

adduced to this fact, would have reached him, unless he had avoided them by reclining towards the pulpit.

The committee further find, that there were between six and seven hundred qualified voters present at the meeting, twenty-five of whom voted, and one witness testified, that, in his opinion, no more votes would have been given in; but when it was demanded of the voters if their votes were all in, the answer No! No! was generally given; that the time which elapsed from commencing to receive votes until the box was turned and the result declared, was not more than twelve minutes, and that the time from the opening to the dissolving of the meeting, was twenty-eight minutes, and that immediately after the dissolution of the meeting, the aforesaid Elkanah French, Esq., upon some one expostulating with him on his conduct, openly declared, that he had intended to manage the meeting according to his own mind, and that he had done it.

The committee have the honor to exhibit the above statement of all the facts, which can be considered material; long as it appears, it is as much condensed as possible from the mass of documents and evidence adduced in the case; and they feel themselves obliged respectfully to suggest, that in their very elaborate inquiry into, and minute and laborious investigation of, the facts and circumstances attending this election, they have been actuated by an anxious desire to discharge their duty with great care and fidelity, in a case of much more than ordinary import, whether considered as affecting the rights of the people of this commonwealth, the immunities of the large and respectable town of Rehoboth, the privileges of the sitting members, or as affording precedents for the governing of towns, in the exercise of the elective franchise, in the choice of representatives.

Upon mature consideration of the foregoing facts, and a careful application of the principles of the constitution and law to them, the committee report, that the supposed election of representatives to this house, from said town of Rehoboth, on the eighteenth day of May, in the year of our Lord one

thousand eight hundred and eleven, is altogether void and of no effect, and consequently, that the seats of Caleb Abell, John Medbury, Elkanah French, Sebra Lawton, and Timothy Walker, Esquires, returned as members as aforesaid, be declared vacated."

This report, having been made the order of the day, for the eighteenth of February, was then taken up, and after debate thereon, the question of agreeing to it was decided by yeas and nays, in the affirmative, yeas, 206, nays, 181.

The speaker then declared the seats of the members from Rehoboth to be vacated.

RULES CONCERNING CONTROVERTED ELECTIONS.

The house, on the 29th of May, 1811,[1] having

"Ordered, That the rules and orders of the last house of representatives be adopted for the present, by this house, until new ones shall be agreed on by the house."

On the fourth of June,[2] the speaker (Hon. Joseph Story) ruled, that the rules, with regard to elections, adopted by the last house, on the twenty-eighth day of February last, were to be considered as the rules of proceeding for the present, until other rules should be adopted.[3]

[1] 32 J. H. 19. [2] Same, 47.

[3] In the British parliament, besides the methods established by usage and custom, two kinds of rules or orders, for the regulation of the proceedings, are in use, namely, *standing* and *sessional* orders. The former endure from one parliament to another, and are of equal force in all. The latter are renewed at the commencement of each session, and otherwise have no binding force, beyond the session for which they are made. An order becomes a standing order, simply by being declared to be so, either at the time when it is originally made, or afterwards. A standing order, until it is vacated or rescinded, has the same authority upon succeeding houses, as if enacted by law. In this country,—certainly in congress and in this commonwealth,—the rules and orders made by one house are not binding on a succeeding house, until they are adopted by the latter.

ASHBY, BOSTON, BRADFORD, CAMBRIDGE, CANTON, FRANKLIN, HOPKINTON, MALDEN, MILTON, PORTLAND, ROCHESTER, WISCASSET, WRENTHAM.

[The elections in these towns were controverted, but the committee on elections do not appear, from the journal, to have made a report upon any of them.]

MIDDLEBOROUGH.

A petition against an election was rejected, because not served on the members returned, according to the rule of the house.

A petition against the election of five representatives, returned from the town of Middleborough, being presented, and it appearing that copies thereof had been served on two only of the members, the speaker decided that it could not be sustained.[1]

RULES CONCERNING CONTROVERTED ELECTIONS.

On the twenty-second of February, a committee was appointed to consider the expediency of limiting the time, or fixing a manner, of proceeding on controverted elections, different from that practised in this house, with leave to report by bill or otherwise;[2] and on the twenty-ninth of February, the following rules were adopted upon the report of the said committee:[3]

"1. Ordered, That in future all petitions against any member or members returned to the house of representatives shall be presented, read, and committed, within the first four days of the first session of the general court.

[1] 32 J. H. 134. [2] Same, 360. [3] Same, 388.

2. Ordered, That members, who are appointed on committees of controverted elections, shall not be put on any other committees, until they shall have made up their report on such elections.

3. Ordered, That all petitioners, or their agents, against any such member or members, shall be ready with their evidence, before said committee, on or before the tenth day of the first session of the general court. And the sitting members, whose election shall be controverted, shall also be ready with their evidence within the first twelve days of said session, unless in such case as the house or committee shall find good and sufficient reason to order otherwise; and in all cases where it shall not be otherwise ordered, said committee shall sit, hear, and determine, in the recess of said court, and report thereon within the first three days of the second session of the general court." It was also

"Ordered, That the clerk cause the foregoing rules and orders to be published in the newspaper in which are printed the laws of this commonwealth."

1812—1813.

COMMITTEE ON ELECTIONS.

Messrs. *Samuel Putnam*, of Salem, *Charles Davis*, of Boston, *Jairus Ware*, of Wrentham, *Oliver Crosby*, of Brookfield, *William T. Gerrish*, of Kittery.

REPORTER.

Theron Metcalf, Esq., of Dedham.[1]

[1] Mr. Metcalf was appointed reporter to the house, in cases of controverted elections, at the May session, 1812, and was re-appointed the three succeeding years. The cases during that period, except those of *Woburn*, *Sutton* (1812–13), *Marblehead*, *Daniel Merrill* (1813–14), *Dedham*, *Solomon Aiken* (1814–15), together with the reports of the proceedings and debates, and the notes appended to the cases, (except those included in brackets [ ],) are from the pen of that gentleman, and were originally published by him, under the direction, and for the use of the house.

NORTH BROOKFIELD.

Of fraudulent contrivances to make voters.

The election of Ezra Batchellor, returned a member from the town of North Brookfield, was controverted by John Potter and others, inhabitants of that town, on the ground that illegal votes were received at the election.[1]

The facts, in the case, appear in the following report of the committee on elections, made the ninth of June, and agreed to,[2] namely :—

"The meeting for the choice of representatives, for that town, was holden on the 4th of May, 1812; the said Ezra Batchellor, the sitting member, was one of the selectmen, and present at the meeting; the whole number of votes given in for a representative, at said meeting, was one hundred and seventy-nine; ninety votes were necessary for a choice; the said Ezra Batchellor had ninety votes; Thomas Hale, Esq., had eighty-seven votes, and there were two scattering; the board of selectmen consisted of seven persons; Francis Hare, Isaac Lovering, and Joel Winslow, were admitted by a majority, namely, four of the selectmen, to vote at said election, the said Ezra Batchellor giving his casting vote in their favor; the said Francis Hare formerly belonged to North Brookfield, but in March last he removed from that town to Spencer, where the said Francis has ever since constantly resided, and had his home; yet the said Francis Hare was permitted to vote at said election, and voted for the said Ezra Batchellor; said Isaac Lovering appeared, with one Luke Potter, before the list of selectmen, when they were preparing the list of qualified voters, and the said Potter, in the presence of the selectmen, handed a paper to said Lovering, requesting them to take notice, 'that he made a present of that note to Lovering,' who immediately laid the same on the table. It purported to be a note from Captain Peter Harwood, to the said Luke Potter, for two hundred dollars. The said Lovering

[1] 33 J. H. 32. [2] Same, 146.

never promised to make any consideration for said note, is not related to the said Potter, and he has delivered the same to the said Potter, since the election. The said Lovering has always been considered so poor as not to be able to pay any tax; and he did not produce any other evidence of property, than the said note, to qualify him as an elector.

The said Joel Winslow produced to the said selectmen, as evidence of his qualification as to property, two notes against one Elijah Richardson, amounting to one hundred and forty-one dollars; and one note against Ebenezer Holmes, amounting to fifty-eight dollars; and another note against one Leonard Winslow, amounting to about twenty-two dollars. The three notes, first abovementioned, were received by said Winslow, on the first Monday of April last, as security for a debt, that somebody, as he said, owed him, for about fifty or sixty dollars; but the said Winslow refused to declare from whom he received the same; and it did appear, that he had not retained the possession of the same notes since he first received them.

It appeared, in evidence, that these notes were furnished by Capt. Peter Harwood, who did not choose to tell whether he had taken them back since the election.

The said Winslow did not produce any other evidence of property than is above stated, to qualify him as an elector, and he has not been known to have property to the amount of two hundred dollars, unless the above transaction is evidence of that fact.

Upon these facts, the committee unanimously report, that the said supposed election of the said Ezra Batchellor was utterly void and of no effect, and report that he is not entitled to a seat; but that his seat should be declared vacated.'

YORK.

A warrant was duly issued and served for a meeting for the choice of three representatives.—Afterwards a second warrant was issued for a meeting, on the same day, for the choice of a fourth, of which less notice was given than was usual in the town.—Four representatives were chosen at successive ballotings.—It was held, that there was no legal notice of the second warrant, and that the election of the person last chosen was void.

Where a town has passed no vote particularly specifying the manner in which meetings shall be notified, the notice of a meeting is to be given according to usage.

The election of Elihu Bragdon, Joseph Bradbury, Josiah Bragdon, and Peter Weare, members returned from the town of York, (and who were chosen at two different meetings, held on the same day,) was controverted by Isaac Lyman and others, on the following grounds, stated in their petition, namely[1]:—

1. Because the selectmen, contrary to the usage in said town, notified the inhabitants thereof, in their warrant for the first meeting, to assemble and choose "three" representatives, thereby depriving the inhabitants of the privilege of deciding upon the number.

2. Because the selectmen, in their warrant for the second meeting, notified the inhabitants to meet for the choice of "one additional representative;" and did not give that notice thereof, which law and usage required;

3. Because the said town did not contain the requisite number of ratable polls, to entitle it to four representatives.

The petition was accompanied by depositions and other documents, upon which the committee on elections reported as follows:—

"They find that the selectmen of York issued their warrant in due form, directed to a constable, to notify the qualified voters in said town to meet for the choice of three representatives to represent said town in the general court the present year; pursuant to which warrant, the said constable gave said inhabitants legal notice; that afterwards, on the 25th day of

[1] 33 J. H. 32.

April last past, the said selectmen issued another warrant, directed to a constable as aforesaid, to warn the qualified voters of said town to meet for the choice of another representative. The committee further find, that in pursuance of said warrants, the inhabitants did meet on the 6th day of May last past, and voted to send four representatives. On the first balloting, it appeared that Elihu Bragdon was chosen; on the second, Joseph Bradbury; on the third, Josiah Bragdon; on the fourth, Peter Weare. It further appears to the committee, that the town of York contains a sufficient number of ratable polls to entitle the same to three representatives, and it does not appear but that there is a sufficient number to entitle them to four representatives. But the committee further find, that the warning given to said inhabitants, on the second warrant, was not such as is usual in said town, and, in their opinion, not legal. Wherefore the committee unanimously report, that the said supposed election of the said Peter Weare was utterly void, and of no effect; and that he is not entitled to a seat in this house, but that his seat therein should be declared vacated."

This report was made on the ninth of June, and was agreed to on the same day.[1]

Note. The principle, on which the house proceeded in this case, is to be found in the statute of 1785, c. 75, § 5, by which it is enacted, 'that when there shall be occasion of a town meeting, the constable or constables, or such other person as shall be appointed for the purpose, by warrant from the selectmen, or the major part of them, shall summon and notify the inhabitants of such town to assemble at such time and place, in the same town, as the selectmen shall order, the manner of summoning the inhabitants to be such as the town shall agree upon;' 'and no matter or thing shall be acted upon in such a manner as to have any legal operation whatever, unless the subject matter thereof be inserted in the warrant for calling the meeting.'

Under this statute, two practices have prevailed. Where a

[1] 33 J. H. 146.

particular method of notifying town meetings had obtained by long usage, towns, after the passing of this statute, voted, that their meetings should in future be notified as heretofore; without describing the method which had heretofore been pursued. Other towns passed votes, particularly specifying the manner in which their meetings should be notified. And it is believed, that there are instances, where towns have passed no vote on the subject, but notify their meeting, according to ancient usuage only. Perhaps this is an implied agreement, in what manner meetings shall be notified.

In the case above, the warning of the second meeting was conformable to neither of these methods.

It has sometimes been made a question, (though no such case is known to have come before the house,) whether, under a warrant to choose 'a representative,' a town can legally elect two representatives: Whether 'the subject matter' is substantially 'inserted in the warrant,' so as to authorize the election of more than one. It is apprehended that the above case is decisive of this question, unless there be a distinction between choosing two representatives under a warrant to choose a 'representative,' and choosing four representatives, under a warrant to choose three; which distinction, if it exist, is not perceived.[1]

WESTFORD.

State paupers are not ratable polls.

Students at an academy, in a town, where their parents or guardians do not belong, are not ratable polls in such town, if under twenty-one years of age; it seems.

The election of Jesse Minot, one of the two members returned from the town of Westford, was controverted by Benjamin Osgood and others, on the ground, that the said town did not contain a sufficient number of ratable polls to entitle it to two representatives.[2]

[1] See case of *Harvard*, 1806–7, ante, p. 69.

[2] 33 J. H. 11.

The committee on elections, on the ninth of June, made the following report, which was agreed to,[1] namely:—

"The petition, in this case, is predicated on the want of a sufficient number of ratable polls, in said town, to entitle it to two representatives in the general court.

In this case, the selectmen and assessors of said town, in compliance with an order of the committee, produced a list of all the persons they considered as ratable polls, belonging to said town, on the first Monday of May last, the day of the meeting of the inhabitants of said town, for the choice of one or more representatives to this general court; at which meeting, they did choose two representatives, at separate ballotings, to wit: Thomas Fletcher, Esq., at the first ballot, and Jesse Minot, at the second ballot. It appeared that the list aforesaid contained three hundred and seventy-five names, one state pauper, and eleven young gentlemen, who were, on said first Monday in May, students in Westford academy, situate in said town. It appeared to the committee, in evidence, that the eleven students referred to were all over the age of sixteen, and under the age of twenty-one years, whose parents and guardians all belonged to towns other than the said town of Westford. Upon these facts, the committee are unanimously of opinion, and report:—

That said town of Westford, at the time of said election, did not contain a sufficient number of ratable polls to entitle it to two representatives, and that the supposed election of Jesse Minot, on the first Monday in May, 1812, was utterly void, and of no effect; and that Jesse Minot is not entitled to a seat in this house, and that his seat be declared vacated."

When this report was read in the house of representatives, only one member expressed a doubt, whether the students referred to were improperly put on the list of ratable polls. But as it appeared to be the unanimous opinion of the house, that state paupers are not ratable polls, and as striking off one from the list produced in this case, by the selectmen, would reduce the number so as to avoid the election of the person chosen at the

[1] 33 J. H. 146.

second balloting, the question respecting the students may, perhaps, be said not to have been finally settled.

[The entry on the journal, in relation to the above report, is, that it be "so far accepted, as that the member be not entitled to a seat, and that the residue of the report be recommitted;" but for what purpose is not stated, and cannot readily be conjectured, unless it were, that the committee might examine and express an opinion upon the question, whether the students alluded to were or were not ratable polls. The committee reported a reference to the next session, which was agreed to, and no further action appears to have taken place in relation to the subject.[1]

The question, whether students, at an academy or college, are legal voters in the town where they have a temporary residence for the purposes of education, came before the supreme judicial court, in the case of *Putnam* vs. *Johnson*, in 1813, (10 Mass. Rep. 488,) and was the subject of elaborate discussion, both by the counsel and court. In the opinion of the latter, delivered by Parker, J., it is said, that "a residence at a college or other seminary, for the purpose of instruction, would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home, and continued under his direction and management. But such a residence will give a right to vote to a citizen not under pupilage, notwithstanding it may not be his expectation to remain there forever." See a report of the committee on the judiciary of the house, on this question, in 1842, *post*, page 436, and an opinion of the justices of the supreme judicial court thereon, in 1843, *post*, page 510.]

[1] 33, J. H. 221.

WESTERN.

If selectmen, at an election for representative, receive illegal votes for the person elected, which are counted, or reject legal votes for other persons, which are not counted, in estimating the whole number of votes given, and the votes so received or rejected are sufficient in number to change or affect the majority, the election will be void.[1]

The election of Joseph Field, returned a member from the town of Western, was controverted by Josiah Putnam and others, on the ground, that the selectmen, at the meeting in which said Field was elected, received the votes of several persons, who were not qualified voters, and rejected the votes of others, who were duly qualified.[2]

The facts in the case are stated in the following report of the committee on elections, which was made on the seventeenth of June, and accepted,[3] namely:—

"A meeting, duly and legally warned, for the choice of representative from said town, was there holden on the fourteenth day of May last past:—the whole number of votes given in at said election was one hundred and sixty-eight; the said Joseph Field had eighty-eight votes, Samuel Knight had seventy-eight votes, and there were two scattering. The said Field was chairman of the board of selectmen, who admitted five persons notoriously unqualified as to property, who were friendly to the election of said Field, to vote at said election, notwithstanding the objections made against them on this behalf. The names of the persons so admitted are Joel Barrows, Aaron Hobbs, John Brown, Amri Strickland, and Samuel Monroe, the last of whom, the sitting member ad-

[1] This general principle of election law is thus stated in an English work of authority in reference to county elections:—

"In case the sheriff should wrongfully reject a vote, which has been regularly tendered in the proper booth, and there should be a petition against the election, such vote will not be lost, but will be added to the poll, as if it had been taken down when tendered. It is unnecessary to cite cases to prove this; upon every petition on a controverted election, it is the constant practice for the select committee, now substituted for the house, or the committee of privileges, to add to, or strike off, such votes as they find necessary to correct the poll, and make it an exact list of all the qualified votes *tendered* at the election." Heywood on County Elections, (2d ed.) 500.

[2] 33 J. H. 32. [3] Same, 213.

mitted, before the committee, not to have the requisite qualification as to property. The said selectmen admitted four persons to vote, who were friendly to the election of said Field, who had not resided in Western one year next preceding the said election, notwithstanding the objections made against them on this behalf, namely, George Hodges, Jason Gilbert, Nathan Hathaway, 2nd, and Ira Robinson, the last of whom lived at Leicester, and went from thence to Western, the night before the said meeting, and returned back to Leicester, the day after; although they rejected the votes of several persons under similar circumstances, but who were opposed to the election of said Field. The selectmen rejected the votes of two persons, who were qualified in point of property and residence, and who were opposed to the election of the said Field, namely, Dwight Fosgate and John Shepard. These persons voted at said Western, at the last election for governor, and their names were struck off from the list of voters without notice to them, and without good reason, as the committee are unanimously satisfied, from the evidence exhibited to them. The said Dwight Fosgate and John Shepard made application to the selectmen to vote at said election, but were refused; and the committe are all satisfied, that the selectmen did not give the inhabitants a fair and reasonable opportunity to prove their qualifications as voters, before this election. And the committee further report, that the votes of the nine persons first named, being deducted from the whole number given, would reduce it to one hundred and fifty-nine, to which should be added the two votes illegally rejected, namely, of the said Dwight Fosgate and John Shepard, which would have made the whole number of legal votes at said election, one hundred and sixty-one; necessary to make a choice eighty-one; that the said Field, the sitting member, (deducting the nine illegal votes given,) would have only seventy-nine. Wherefore, the committee are unanimously of opinion, and do report, that the said supposed election of the said Joseph Field, was utterly void, and that his seat ought to be declared vacated."

MILTON.

Where two representatives were elected at one balloting by a town which had a right to send but one, it was held, that the election of both was void.
The rules and orders of one house of representatives are not binding upon another.
Precepts for a new choice will not be issued in cases of illegal election.

The election of Asaph Churchill and William Pierce, members returned from the town of Milton, was controverted, by Amos Holbrook and others, on the ground, that the number of ratable polls, in said town, did not entitle it to two representatives.[1]

The committee on elections, on the seventeenth of June, made the following report in this case, which was agreed to the same day, namely[2]:—

"A meeting of the inhabitants of said town, legally warned, was held on the fourth day of May last past, for the purpose of choosing one or more representatives from said town to the general court; at which meeting, said inhabitants did choose the said Asaph Churchill and William Pierce, at one balloting, as representatives from said town.

In this case, the selectmen and assessors of said town produced, before the committee, a list of all the persons they considered as ratable polls belonging to said town, on the first day of May last. The said list contained the names of three hundred and eighty-six persons: two under the age of sixteen years, to wit, Abner Bowman and Charles Belcher, two, who, more than a year before the first day of May last, had enlisted, and have ever since continued in the service of the United States, to wit, Joseph Hunt and George Reed: nine transient persons, not belonging to said town, to wit, Croade Sturtevant, Jacob Warner *alias* John Keith, Heman M. Burr, Charles Howard, Adolphus Porter, Simon Dunnels, James Hooton, Zebra Woodward, and James M. W. Thayer, the last of whom came to said town on the third day of May last, staid there a few days, and then enlisted into the service of

[1] 33 J. H. 33, 34, 66. [2] Same, 213.

the United States. Three other persons on said list did not belong to said town, namely: Henry Vose, Enoch Baldwin, and Nathaniel Thomas; and one person not in existence, whose name was put on said list, as the assessors averred, by mistake. The committee, on these facts, are unanimously of opinion, and do report, that the said town of Milton did not, at the time of said election, contain a sufficient number of ratable polls, to entitle it to two representatives; and inasmuch as the said Asaph Churchill and William Pierce were chosen at one and the same balloting, that the supposed election was utterly void, and that their seats in this house ought to be declared vacated.

At the request of two of the committee, it is observed, that the petitioners did not give notice to the selectmen and to the sitting members, pursuant to the requisition of the last house of representatives. But the sitting members attended before the committee, and were fully heard, and made no objection before them, of a want of notice."

The "requisition," referred to by the committee, is contained in the following resolve or order of the house, passed February 28, 1811:—

"No petition against the election of any member shall be sustained or committed in the house, unless at the time of presenting the same to the house, the said petition be accompanied by evidence that a copy of the same petition has been given to some one of the selectmen of the town, whose elective franchise is affected thereby, and the person or persons elected, or left at their several last and usual places of abode, ten days at least, before the petition shall be presented to the house."

The committee probably called this "the requisition of the last house of representatives," in consequence of the following entry in the journal of the last house:—

June 4, 1811.

"The speaker ruled, that the rules, with regard to elections, adopted by the last house, on the 28th of February, be considered as the rules of proceeding for the present house."

The following order passed the last house:—

FEBRUARY 29, 1812.

"Ordered, That in future, all petitions against any member or members returned to the house of representatives, shall be presented, read and committed within the first four days of the first session of the general court."

The petition, in the above case, was not presented within the first four days of the first session, and objections were made against its being committed: It was said, that the order of the last house was intended to operate prospectively, and, according to usage and propriety, was binding on this house: On the other hand, it was said to be perfectly well known, that the house, for the time being, had the exclusive right of determining questions respecting the election of its members, and that one house could not make rules that should be binding upon another. Very little was said upon the subject until the question of the acceptance of the report of the committee came before the house, when a debate arose, of which, it is believed, the following outline contains the material arguments:—

Against accepting the report:—It was said that the house were bound to preserve consistency; that by a law of the last session, the town of Milton is obliged to pay, in the state tax, for 375 polls, according to the return of their assessors; and that, as they were obliged to bear the burdens, they ought not to be deprived of the privileges of government; that a town in the neighborhood of Milton, which returned to the committee of valuation only 267 polls, now has two representatives on the floor of the house; that the house ought not to go behind the return of the selectmen and assessors, but should leave them to be punished by legal process, if they conducted improperly; that those transient persons, who are always floating, some of whom were on the list of ratable polls in Milton, ought to be taxed somewhere, and that the selectmen and assessors of that town had very properly put them on the list of ratable polls, because they were there on the first of May—some of them, indeed, were not there till after the first of May—but it was said, that it had been usual to count the ratable polls on the day of the election of representatives; that there was no reason why both members returned in this case should lose their seats on account of their having been chosen at one balloting, when the town was unquestionably entitled to one. If there be a distinction between a choice, in such a case, at one, and at separate ballotings, it must be either because it is difficult to discriminate, or because the house would punish the town; that the house is not authorized to inflict punishment, and if it were, still Milton is not a subject of punishment, because she bears the burdens of the state, in the same manner as if she had 375 ratable polls; that there is no difficulty in determining which of the members should retain his seat; that the legislature might decide it; that the one, whose name was

first on the votes, or who had the largest number of votes, should continue to represent the town; that the house will be indulgent to towns when there is no flagrant misconduct, and when the number of ratable polls is very nearly sufficient to authorize the proceedings; and above all, it was insisted, that the house was bound to regard the rules, respecting elections, adopted by former houses, at least, until new rules are formed; that those rules were nugatory unless they operated prospectively; that the only object in adopting them, was to regulate the proceedings of this house; that the rules existed when the present members were chosen; that they were proper in themselves; that great inconvenience was felt before they were adopted; that they should be adhered to, in order to acquaint the public how to proceed, and to introduce uniformity; that the object of appointing a reporter of proceedings in these cases was to produce such uniformity, by reports of decisions by the house; that these decisions will be of no authority, and answer no good purpose, if the rules of proceeding, under which one house act, are disregarded by the next; that as the house in 1811 acted upon the rules in 1810, and the people throughout the state were or might have been appraised of those rules, the house should scrupulously adhere to them, unless, upon the face of the report, it appears that the town and the sitting members waved the privilege; that the law of courtesy is as binding as any other law; that the house, at the commencement of a session, could not be organized, but by obeying this law; that it has for a long time been the constant usage, for the oldest member of the Boston seat to preside at the choice of a speaker and clerk of the house, and if some future house should refuse to acquiesce in this mode of organizing, there would be great inconvenience and confusion; that the members, this session, took their seats by lot, according to an order of the last house; and that the same reasons operated to induce the house to conform to the rules respecting controverted elections, which operated in the other instances, namely, convenience and regularity; that if the report is accepted, there will hereafter be no precedent or principle, by which the house will feel itself bound. That the reason why the sitting members did not object before the committee, to their want of due notice, was, that the question, whether orders of former houses were binding, had in their opinion been determined, when the petition was committed.

On the other hand, it was insisted, that this was the first instance, in which it was ever pretended, that one house of representatives could bind another to pursue any particular course, respecting the election of its members; that the constitution had decided the point. In the third section, chapter 1st, part 2d, of that instrument, it is said 'the house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution;'—'and shall settle the rules and orders of proceeding in their own house.' That the 'rules and orders' of one house were never considered as binding upon another; on the contrary, at the commencement of the first session, the house always forms and adopts its own rules and orders. Sometimes, former rules are adopted; but the very circumstance of their being adopted shows that they are not considered binding before their adoption. It was acknowledged, that it is just, that the towns and sitting members, whose elections are controverted, should have reasonable notice. In this case, they have had notice, and a full hearing; the acceptance of the report, therefore, will violate no principle of natural justice. As the facts are found, and it is ascertained that there was not a sufficient number of ratable polls, to entitle the town to two representatives, the constitution must now control the house. Whether the house will inquire, is one question; circumstances may render it expedient and proper not to make the inquiry; as unreasonable delay in forwarding a remonstrance, or want of notice

to the parties interested. But after the parties have been heard, and the result of the investigation is made known to the house, it is too late to say that the house ought not to decide according to the facts and the constitution.

As to the number of ratable polls returned to the committee of valuation, it was answered, that as Milton sent two representatives last year, the assessors might have returned a sufficient number to justify the proceedings of the town; or there might have been more ratable polls there, last year, than this; that if the committee on elections could not go behind the return of the selectmen and assessors, and ascertain the true number of ratable polls, frauds might be practised with impunity; that the method of inquiry, which is founded on the reason and nature of the thing, and to which the committee had in this instance conformed, had been uniform since the adoption of the constitution, and was now for the first time questioned; that there was no way of determining, which of the two representatives should retain his seat, if one were entitled to it; and that it had been the constant usage, in such cases, to vacate the seats of both; that there would be no departure from any principle, which the house had heretofore adopted, in accepting the report, inasmuch as the question turned merely upon the form of proceedings, by which the house were not bound, and which could scarcely be said to involve a principle; that the uncertainty and confusion, which were apprehended from the acceptance of the report, could not follow, because all tribunals occasionally change their forms of proceeding, but while they adhere to the principles and spirit of the laws, under which they act, no confusion is experienced or to be dreaded; that the evils which are predicted, as the necessary consequences of accepting this report, are rather to be anticipated from the violation of the fundamental principles of the constitution, and a disregard of the maxims of justice, of equity, and of our ancestors.

After the report was agreed to, and the seats of the members returned from Milton, declared vacated:—

Mr. Holmes moved, that a new precept be issued to the town of Milton to chose one or more representatives to this house; and he cited the case of Amherst in 1780,[1] in which a new precept was issued, in a case of illegal election.

Against this motion, the constitution was quoted, which provides, that "the members of the house of representatives shall be chosen annually in the month of May, &c." It was said, there are no exceptions to this provision, except what are found in the constitution itself. And all the exceptions, there found, are in the sixth chapter, and include only cases of election or appointment of members to offices, the accepting of which operates as a resignation of their seat in the house. In such cases, the constitution provides that "the place so vacated, shall be filled up."

Mr. Holmes's motion was lost.

Mr. Cannon then moved, that the committee on the pay roll be directed to make up the travel and attendance of the gentlemen returned as members from Milton, to the day on which their seats were declared vacated, inclusive.

This motion was lost.

[1] Ante, pp. 1, 2.

DRESDEN.

The election of a member, at one meeting, cannot be superseded, by an election of another, at a second meeting.

An election having been duly effected in a town entitled to only one member, the selectmen, at the request of certain of the inhabitants, called a subsequent meeting for the choice of a representative, of which less notice was given than the bye-laws of the town required; at such meeting, votes for a representative were thrown upon the selectmen's table, in an irregular and disorderly manner, and without being called for, and were sorted and counted by the selectmen, who refused to state for what purpose they were given, or to declare the result; it was held, that the person, who received a majority of the votes so brought in, was not duly elected.

THE election of Nathaniel Benson, as a representative of the town of Dresden, was controverted by Edmund Bridge and others,[1] for reasons which appear by the following report of the committee on elections, made the eighteenth day of June, and agreed to the same day,[2] namely:—

"A meeting of the inhabitants of said town, legally warned, was held on the seventh day of May, last past, for the choice of a representative to the general court, at which meeting, George Houdlette was declared, by the selectmen of said town, to have a majority of the votes and to be duly elected. There was no evidence before the committee that there was any illegality or irregularity in the election of said Houdlette.

It is not pretended that the town has a sufficient number of ratable polls to entitle it to two representatives; but, after the meeting aforesaid, two of the said selectmen [at the request of several persons who were dissatisfied with the proceedings at that meeting,] issued a warrant to warn another meeting of the inhabitants, to be held on the sixteenth day of May last, for the purpose of choosing a representative from said town. The warrant for calling the meeting last aforesaid was posted up in said town only seven days before the said sixteenth day of May, and no other notice was given of the meeting. There was a vote of the inhabitants of Dresden, passed soon after the incorporation of the town, that fourteen days notice shall be given of all future meetings of

[1] 33 J. H. 31. [2] Same, 222.

said town for the choice of town officers, governor, senators, representatives, &c., and that this vote has at all times been observed until the present instance. At said meeting, on the sixteenth day of May last, votes were thrown promiscuously on the selectmen's table, without regularity or order, and without being called for. The votes were sorted and counted by the said selectmen; but the selectmen did not and would not declare for what purpose said votes were given in. The record in the town book is as follows, namely, 'fifty-nine votes were brought in, without being called for, for representative, for Nathaniel Benson, and one for George Houdlette.' The selectmen did not, at the meeting, declare the said Benson to be chosen as representative from said town.

On these facts the committee unanimously report, that the supposed election of Nathaniel Benson was utterly void, and that he is not entitled to a seat."

WOBURN.

Town paupers are not ratable polls.

The election of John Wade, returned a member, (being the second chosen) from Woburn, was controverted by Wyman Richardson, and others, on the ground, that the said town was not entitled, by the number of ratable polls therein, to send two representatives.[1]

The committee on elections made the following report, in this case, namely: —

"The election is controverted on the ground, that the town of Woburn did not contain a sufficient number of ratable polls to entitle it to two representatives. A majority of the assessors of said town have produced a list of the persons they considered to be ratable polls, containing three hundred and ninety-four names. Among these are the names of nineteen persons, all of whom, the committee are unanimously of

[1] 33 J. H. 42.

opinion, are not ratable polls, within the meaning of the constitution; and in addition to said nineteen, there are contained, on said list, the names of three persons, who are town paupers, which the committee unanimously consider not to be ratable polls. If the three town paupers should be considered to be constitutional ratable polls, the town of Woburn, at the time of the aforesaid election, did contain 375 ratable polls, or just sufficient to entitle it to send two representatives. If the three town paupers are rejected, the town contained only three hundred and seventy-two ratable polls, being three short of the number required by the constitution to entitle said town to send two representatives.

On the above facts the committee are unanimously of opinion, and do report, that the supposed election of John Wade, Esq., at said Woburn, on the first Monday in May, now last past, was utterly void, and that he is not entitled to a seat, and that the same be declared vacated."

This report was recommitted, and on the nineteenth of June, the committee again reported, as follows:—

"That, upon additional evidence being submitted to them, they are unanimously of opinion, that the names of three ought to be considered added, after the deductions made in the first report, and this without taking into consideration the town paupers; therefore, that the town of Woburn did, at the time of the election of the said John Wade, Esq., contain three hundred and seventy-five ratable polls, and that he is entitled to his seat."

The report was agreed to.[1]

THOMASTOWN, RANDOLPH.

[The elections in these towns were controverted on the ground of a deficiency of ratable polls, and the seat of one member in each of them vacated.]

[1] 33 J. H. 233.

ELLIOT.

[The election in this town was controverted on the ground of a deficiency of ratable polls, and confirmed.]

CAPE ELIZABETH, WESTFIELD, ANDOVER, UXBRIDGE, LIMINGTON.

[The elections in these towns were controverted on various grounds, stated in the petitions against them, which the committee reported were not sustained by evidence, and the elections were therefore confirmed.]

WRENTHAM, FALMOUTH, STANDISH, BUXTON.

[The elections in these towns were controverted, and the consideration thereof referred from the May session to the next; at which, no further action upon them appears to have been had.]

SUTTON.

A town, entitled to send *three* representatives, voted to send *four*, and proceeded to elect four at separate ballotings: The election of the last chosen was adjudged void, and a question raised as to the validity of the election of the first three chosen.

The election of Josiah Stiles, Jonas Sibley, Darius Russell, and Abijah Burnap, members returned from the town of Sutton, was controverted by Asa Goodale and others, on the ground, that the said town did not contain a sufficient number of ratable polls to entitle it to four representatives, and that the vote of the town to send four was illegal.[1]

[1] 33 J. H. 31.

On the ninth of June, the committee on elections made the following report thereon,[1] which was agreed to.

"A meeting was holden in said town, on the fourth day of May, now last past, when it was voted to send four representatives to the present general court, and accordingly the town did proceed to choose, and did choose four representatives, at four separate ballotings, under the same warrant, and on the same day. At the first ballot, Josiah Stiles, Esq., had a majority of the votes and was declared chosen; at the second ballot, Jonas Sibley had a majority of the votes and was declared chosen; at the third ballot, Darius Russell, Esq., had a majority of the votes, and was declared chosen; and at the fourth ballot, Abijah Burnap had a majority of the votes and was declared chosen. The committee find, that the town of Sutton, at the time of said election, did not contain 825 ratable polls, but that it did contain over 600 ratable polls. Wherefore the committee are unanimously[2] of opinion, and do report, that the supposed election of Abijah Burnap, as a representative of said town, on the said fourth day of May, was altogether void and of no effect, and that he is not entitled to a seat."

On the twelfth of February, the report in this case was recommitted by the following vote[3]:—

"Whereas it appears from the report of the committee on elections, that the town of Sutton, in the county of Worcester, at a meeting holden on the fourth day of May last, did vote to send four representatives to the present general court, and accordingly did choose four representatives, at four different ballotings, under the same warrant and on the same day; that at the first balloting, Josiah Stiles, Esq., was declared chosen; at the second balloting, Jonas Sibley, Esq., was declared chosen; at the third balloting, Darius Russell, Esq., was declared chosen; and at the fourth balloting, Abijah Burnap, Esq., was declared chosen:—

And whereas it further appears from said report, that the

[1] 33 J. H. 146.

[2] A memorandum on the report, in the hand-writing of the chairman of the committee, states, that, "the committee were not unanimous, respecting the election of the said Stiles, Sibley, and Russell."

[3] 33 J. H. 438.

town of Sutton did not contain, at the time of said election, the number of eight hundred and twenty-five ratable polls, being the number required by the constitution of this commonwealth, to entitle it to send four members; in consequence of which the said committee did report, that the supposed election of Abijah Burnap was altogether void and of no effect; but did not report their opinion as to the supposed election of Josiah Stiles, Jonas Sibley, and Darius Russell, who now hold seats: Therefore, ordered, that the report of the committee on elections, respecting the election of the members from Sutton, be recommitted to the same committee, with instructions to report their opinion as to the right of said Josiah Stiles, Jonas Sibley, and Darius Russell, to seats in this house."

The committee do not appear by the journal to have made any report in pursuance of the above order, but the order has the following memorandum on it, signed with the initials of the chairman:—

"The committee did not report in respect to the first three representatives, in consequence of the law having passed inflicting penalties upon towns sending more than a constitutional number of representatives."

[The law referred to is the statute of 1812, c. 135, which was reported and twice read in the house, the same day the committee reported in the above case, but was not enacted until February 27, 1813.]

1813—1814.

COMMITTEE ON ELECTIONS.

Messrs. *Nicholas Tillinghast*, of Taunton, *Charles Davis*, of Boston, *Jacob Reeves*, of East Sudbury, *Oliver Crosby*, of Brookfield, *Jairus Ware*, of Wrentham.

REPORTER.

Theron Metcalf, Esq., of Dedham.

ROXBURY.

At a meeting for the choice of one or more representatives, the selectmen stated that the town was entitled to four, and called on the voters to bring in votes for from one to four. A motion was made and seconded to send two and no more, and this the selectmen, as they had previously determined to do, refused to put or to permit debate upon. Great excitement followed this decision, in the midst of which a motion to adjourn was made and seconded, but the selectmen refused to put it, one of them giving as a reason for such refusal, that there were votes in the ballot boxes. Many voters left the meeting, and others refused to vote. Four persons were declared elected. It was held that the election was not free, and, therefore, void.

Where warrants, calling a meeting for the choice of representatives, were dated on the 5th of May, were delivered to constables for service, between the 5th and 9th, and were returned on the 10th, having been served by printed notifications left at the houses of the inhabitants on the 10th; and it did not appear, that the town had ever passed any vote establishing the manner in which meetings should be called, or that there was any uniform usage therein, as to the same; it was held, that the notice of the meeting in question was reasonable and sufficient.

The question, what number of representatives a town will send, cannot be determined by requiring the voters to bring in their votes for such number of representatives, not exceeding the number to which the town is entitled, as they shall respectively think proper.

The election of Abijah Draper, Crowell Hatch, William Brewer, and Lemuel Le Baron, members returned from the town of Roxbury, was controverted by Thomas Williams and others,[1] for the following reasons alleged in their petition, namely:—

1. That the meeting for the choice of representatives in said town was not notified according to law, or the accustomed manner of warning town-meetings therein;

2. That a motion being made and seconded, in the meeting, that the town should send but two representatives, the selectmen refused to put the question or to suffer debate thereon; and

3. That the meeting was conducted with a degree of violence and disturbance, utterly inconsistent with the freedom of debate and of elections; subversive of the rights of the citizens, and of the most dangerous and fatal example.

The election was supported by a memorial of Samuel Gore,

[1] 34 J. H. 36.

and others,[1] in which they alleged that the statements in the petition were totally groundless, and that in their opinion, the selectmen conducted the said meeting in a constitutional and impartial manner.

The facts in the case are stated in the following report of the committee on elections, which was made on the tenth of June, and agreed to on the next day, by a vote of 169 to 73:—

"A town meeting for the 'choice of one or more meet person or persons to represent that town in the general court,' was holden on Wednesday the twelfth day of May, now last past, pursuant to warrants issued by the selectmen, purporting to be dated the fifth day of the same May. These warrants were delivered to the constables from the fifth to the ninth, and were all returned on the tenth of the same month. Most of the notifications (all of which were printed) were left at the houses of the inhabitants in each parish, on Monday the tenth.

The committee further report, that notice of the meeting was very generally given in the manner aforesaid, and that it was fully attended.

By a law of the commonwealth, passed on the 23d of March, 1786, (st. 1785, c. 75, § 5,) it is enacted, that the manner of summoning the inhabitants to a town meeting shall be such as the town shall agree upon. It does not appear on the records of Roxbury, that the town has ever passed a vote, establishing the manner in which its meetings should be called; and upon investigation, there did not appear any uniform usage in said town as to the manner. It did appear, that in the greater number of instances, the inhabitants have had seven days' notice at the least; but in several instances within the last ten years, the warrants have been dated, and the notifications served, quite as late before the meeting as in the present instance.

There being neither vote nor usage in the town establishing the method of calling and warning its meetings, the committee were left to decide if reasonable notice were or were not given; and the opinion of the committee is, that in the circumstances

[1] 34 J. H. 61.

of the case, the notice was reasonable, and that the first allegation in the petition is not supported.

The committee further report, that immediately after the warrant was read, and the meeting was opened, the selectmen informed the inhabitants, that the town contained a sufficient number of polls to entitle it to send four representatives, and called on the voters to bring in their votes for from one to four; that immediately a motion was regularly made and seconded, that the 'town should send two representatives and no more;' that for several days previous to the meeting, the expense, to which the town might be subjected by sending its full number of representatives, had been a subject of conversation; and that several of those, who had a wish to lessen the number and the expense, came to the meeting with an intention of making, or causing a motion to be made, to that effect, and to support the motion by demonstrations, resulting from calculations of the saving to the town by sending two instead of four, and by arguments derived from other sources.

The committee further report, that previous to the town meeting, the selectmen met and determined they would not put any motion as to the number the town would send, and that they would not permit any debate on such motion; and this determination was not made known to the inhabitants, until the day of the election, and in the manner hereinafter set forth.

The committee also report, that as soon as the aforesaid motion was made by Mr. Ebenezer Bugbee, and seconded by others, the chairman of the selectmen said: 'that motion cannot,' or 'shall not be put.' Several asked why; when Gen. Heath rose, and, addressing the chairman, observed the motion could not be dispensed with; when he was interrupted by the selectmen, some of whom said the motion would not be put, and the chairman read to the general part of the constitution, to convince him that the selectmen had a right to regulate and govern the meeting, and then said the voters were to bring in their votes for from one to four representatives, and that the sense of the town could be taken in that method better than in

any other, and that was the way on which they had determined; and the chairman added, that they were ready and willing to take the consequences, if they were wrong. Gen. Heath insisted with earnestness on the right of the people to debate the question, and objected to the method the selectmen pointed out. He was opposed with warmth by some of the selectmen, who denied the right to debate, and insisted on their method, when the general desisted from any further attempt to speak on that motion. He was followed by Capt. Jonathan Dorr, who also claimed for himself, and his fellow-citizens present, the right of debating and deciding the motion in the usual manner; and produced a paper containing calculations to demonstrate to the town the additional, and, (as it appeared to him,) useless expense to be incurred by sending four representatives; when he was told by the selectmen that his calculations were founded on the expenses of 1811, and that 1811 had nothing to do with 1813. The selectmen and others declared him out of order, and the chairman observed they came there to vote, and not to debate; and repeated the call to bring in votes for from 'one to four.' Mr. Dorr insisted on his right to speak, with earnestness, declaring he had a right to be heard, and he would be heard; and the selectmen persisted in the denial, and insisted on their right of regulating and governing the meeting in the way in which they had determined, with much warmth; when there was a cry from the body of the hall 'out with him—down with the peace party.' Great confusion and much hustling and crowding took place, particularly in the centre of the hall. Sticks were raised, whether for offence, or defence, or both, the witnesses could not determine. Two men were seen having each other by the collar, and a violent scuffle ensued between them and others. Pending this riot, several leaped from the windows, and many left the hall by the doors. Several retired to remote parts of the hall to prevent being involved in the turmoil; of these was Gen. Heath, who retired, as 'for an asylum,' to the selectmen's box, and was by one of them assisted over the railings; and took his seat 'on the right, and

in the rear,' of the selectmen. The confusion still continuing, a motion was made by David S. Greenough, Esq., for the meeting to be adjourned until the next Monday, (the 17th,) which was seconded by others, and refused to be put by the selectmen, one of them assigning as a reason, that there were votes in the ballot boxes.

The committee further report, that debate on Mr. Bugbee's motion was prevented in manner aforesaid, but that no assault or violence to the person of Capt. Dorr was offered either by the selectmen or any others; that the selectmen were very loud and frequent in their calls on the peace officers, and for order. The committee also report, that a majority of the selectmen, from the time Gen. Heath was prevented speaking in manner aforesaid, until after the motion for an adjournment was made and refused to be put, were under the influence of much passion; that one of them, in a very angry and threatening manner, shook his fist in the face of Thomas Williams, Jr., Esq.; and three of them faced to the rear, towards Gen. Heath, while he was sitting quietly, and shook their fists and hands near his face, in an angry manner, exclaiming: 'General this is your doing; this is your peace party.'

The committee further report, that at the choice of representatives by said town the last year, a motion to send two was then made, and the selectmen refused to put the question, and suggested the same method for deciding it which they did this year; and the motion and suggestion then passed without further notice.

The committee further report, that the confusion and difficulty arose from the refusal of the selectmen to put the motion of Mr. Bugbee in the usual form, and from their denying the voters the right of debate; and that several left the meeting from fear of being personally injured; that others left it in disgust; and that several, who remained, refused to vote, being also disgusted at the proceedings, considering them unconstitutional and illegal. The selectmen, however, received ballots from those present, who chose to vote, counted them, and declared the four sitting members chosen.

The committee further report, that it has been decided by a former house of representatives, in effect, that the right of sending representatives is corporate, vested in towns; and the right of choosing them, that is, of designating the individual or individuals, to be the representative or representatives of a town, is personal, and vested in those qualified by the constitution to vote for representatives. The same principle is recognized and settled by the supreme judicial court, in a late decision made on a question submitted, and on which their opinion was required by a former house of representatives; so that the principle must not only be considered as settled by the practice of the house of representatives, but it is the established law of the land.

The warrant in this case was for the purpose of choosing one or more representatives; and whether the town would send one, two, three or four representatives, or not send any, might have been questions, each of which, the corporators, or the legal voters in town affairs, were to decide; and to decide after reasonable debate and fair discussion, if any such debate or discussion were offered. It does appear to the committee, that by our constitution and laws, the right of such debate and discussion cannot be denied, or the exercise of it prevented, without trampling on both.

The committee would further remark, that waiving, for the present, all consideration of the selectmen of Roxbury having refused to hear debate on the motion to send two representatives, the mode they enjoined on the voters to pursue is highly objectionable. The motion before the town was, to send two representatives, and no more. The mode ordered by the selectmen was, for the voters to bring in their ballots, having from one to four names on them, at each voter's pleasure; and this, according to the selectmen's declaration, would decide whether it was the sense of the town, to send two or four. It is obvious great embarrassment and much unfairness would be caused by this; for each voter would have to determine on the number he would send, and the person or persons he would designate, at the same time. Whereas, if the number to be

sent were first settled by the town, the choice of the individual or individuals, to be representative or representatives, could, with much more facility and fairness, be made by each qualified voter. Besides, by pursuing the mode of the selectmen, several questions might have been decided, neither of which were before the town.

To these objections, must be added, the one arising from the circumstance, that the question, whether the town will send a representative, or how many it will send, involves, as before observed, a corporate right, which must be exercised, and the decision made by the corporation, or those qualified to vote in town affairs; but the right of designating who the representatives shall be, is vested, as before shewn, in those qualified by the constitution to vote for representatives. These several qualifications being very different, great injustice may follow from permitting either of the classes of qualifications to govern the other, excepting when they are blended in the same individual.

And inasmuch as it does not appear to the committee, how many representatives the town of Roxbury would have voted to send, had the question been fairly submitted to the corporators, and been permitted to have been reasonably debated and discussed; and inasmuch as it does appear, that from the unconstitutional and illegal refusal of the selectmen of Roxbury to submit the motion to send 'two representatives and no more,' to the disposal of the qualified voters in town affairs, and from their refusal to permit debate and fair discussion of that motion, much confusion and tumult did ensue, in which a majority of the said selectmen did participate; and inasmuch as many of the voters left the meeting from fear of personal injury, and from disgust; and others, who remained at the meeting, refused to vote, lest they might be considered as countenancing unconstitutional and illegal proceedings: It is the opinion of the committee, that the election aforesaid was not free; and where freedom is not, there can be no choice. And whereas, on the freedom and purity of our elections, the welfare and happiness of the people essentially depend, the

committtee are compelled to report, and do report, that the supposed election of Abijah Draper, Crowell Hatch, William Brewer, Esquires, and Dr. Lemuel Le Baron, is altogether void and of no effect, and that their seats in this house be declared vacated."

In debate upon the foregoing report, much was said about the different qualifications of those who might vote on the question whether a town should send any representatives, and how many; and of those who might vote in designating the person or persons to represent a town. But since the statute of 1813, c. 68, § 6, has abolished this distinction, if it ever existed; it has been thought proper to omit the discussion of this point. By that statute it is enacted, 'that the qualifications of voters in any town, on any question whether such town will send a representative to the general court, and on all questions involving the number of representatives such town will send, shall be the same in all respects, as are required by the constitution, to entitle a person to vote in the choice of an individual or individuals, to be representative or representatives in the general court of this commonwealth.'

The above report was opposed by Messrs. Brewer and Draper, of Roxbury, Green, of Berwick, Endicott, of Dedham, and Hall, of Williamstown; and supported by Messrs. Otis, Whitman, and Sumner, of Boston, Tillinghast, of Taunton, Crosby, of Brookfield, Reddington, of Vassalborough, and Manning, of Gloucester.

Against agreeing to the report, it was said the selectmen had a discretionary power to order the question, concerning the number of representatives the town would send, to be determined in any manner they pleased, provided the voters were not deprived of their corporate or individual rights; that in this case the manner chosen by the selectmen was perfectly fair and correct, inasmuch as the number voted for by a majority of the electors would be the number which the majority wished should represent the town; and therefore, that the selectmen's refusing to put Mr. Bugbee's motion did not deprive the electors of an opportunity to determine how many representatives should be chosen. It was said that the mode adopted by the selectmen was the readiest which could be devised; because, if the preliminary question had been taken separately, and it had been voted to send four representatives, yet if votes had afterwards been given for two only, the town would have had only two representatives; so if the town had voted to send two representatives, and the votes had been given for four, four would have been legally chosen, as a majority voting for four could, in effect, rescind the previous vote. So that a preliminary vote on the number to be chosen could be of no service, and might lead to confusion and trouble.

It was further said, that the mode which the selectmen adopted was the least objectionable, because some of the voters might not choose to vote openly on the question of how many should be chosen, and it is the policy of the law to enable electors to act freely, and without bias from fear or favor: And as no corrupt intention was proved upon the selectmen, the town ought not to be disfranchised for their mistake, even allowing that they had mistaken the proper course, in regard to the manner of ascertaining the sense of the town as to the number of representatives to be elected.

It was also said by one of the gentlemen, whose seats were in question, that the town of Roxbury had a right to send four representatives, and that the constitution requires of every town which has the right, that it exercise that right; and that the selectmen could not take away the rights of the town, and were justifiable in their refusal to become accessary to any attempts of others to take them away.

On the other hand, it was said that the constitution is not imperative as to the choice of more than one representative, but leaves it to the discretion of the town: And even the right to choose one is a corporate right, and the duty, if it may be so called, of choosing one or more, is a corporate duty. The right is to be exercised and the duty performed by the corporation. According to the supreme judicial court, "the right of sending representatives is corporate, vested in the town: and the right of choosing them is personal vested in the legal voters; because the right of sending a representative is corporate, if the town by a legal corporate act vote not to send a representative, none can be legally chosen by a minority dissenting from that vote.'[1] It was said to follow of necessity from this opinion, that if the town of Roxbury had voted to send only two representatives, four could not have been afterwards elected, unless the vote had been formally reconsidered. This, it was said, was a complete answer to the suggestion, that the preliminary vote would be rescinded by the ballots being given for more than the town had voted to choose, and also showed that the selectmen, if they refused to put Mr. Bugbee's motion, for the reason suggested by the member returned from Roxbury, acted under an entirely false and erroneous impression. The corporation alone was competent to decide whether to exercise its corporate right at all, and how to exercise it.

This doctrine, it was said, was further confirmed by a statute passed April 20th, 1781, (statute 1780, c. 26,) and now repealed, which required the selectmen to call meetings in the month of May, for the purpose of choosing one or more representatives, agreeably to the constitution, and also by the phraseology of the statute of 1795. c. 55, now in force; by which it was enacted, 'that the inhabitants of every corporate town, having a right to choose a representative or representatives in the legislature of this commonwealth, shall be convened for that purpose,' &c.

It was asked, who is to determine the number to be sent? Neither the constitution nor the law has given this power to the selectmen. It must, therefore, reside in the corporation, and be exercised by the corporation.

In answer to the argument, that the number voted for, by the majority voting, would be the number which the town chose to send, and that the votes would determine the question; it was said, that besides the embarrassment, unfairness, and confusion, pointed out by the committee, in the report, it was evident, that it never could be ascertained, that the town, after a full hearing and discussion of Mr. Bugbee's motion, would have determined, in any manner, to have sent four representatives; and above all, it was demonstrable, that the method adopted and enforced, by the selectmen, was fallacious. Suppose 300 electors give in their ballots; 100 vote for A, B, C, and D; 100 vote for A and B; and 100 vote for C and D. According to the selectmen's notion, two-thirds of the voters would be in favor of sending but two representatives, and yet each of the candidates voted for would have two-thirds of the votes, and there would be no possible way, in which the selectmen could legally refuse to return the whole number to the general court.

So if three-fifths, or any greater proportion of the voters, had wished not to send any representative, the method pursued by the selectmen would have enabled the smallest minority to make the choice, unless the electors present, instead of those who vote, should be taken into calculation; in which case, might be seen the awkward and farcical exhibition (for example) of two hundred and ninety-nine members of a corporation, which contained six hundred electors, voting for three representatives, and the presiding officers, thereupon gravely determining that it was the vote of the town not to send any representative.

[1] 7 Mass. Rep. 526; ante, 120.

But allowing, for argument's sake, that the plan adopted by the selectmen would have led to a correct result, still it was urged, that their refusing to put a motion, which was proper in itself, and made at a proper time, and in a proper manner, was such an arbitrary, illegal, and unconstitutional act, as would vitiate all the subsequent proceedings which were connected with it; that it was an example, which it was the sacred duty of the legislature to discountenance and condemn; that it rather befitted the conclave of a Spanish inquisition, or the 'dumb legislation' of a celebrated assembly in France, than the legally appointed meetings of the citizens of a free republic.

ELLIOT.

Where selectmen, at the time of issuing their warrant for a meeting for the choice of representatives, had not taken the oath required by St. 1805 c. 26, § 4, "respecting all elections and the returns thereof," but took the same on the day of election, before proceeding to open the meeting; this was held to be a sufficient compliance with the statute.

The election of Samuel Leighton and John Hammond, members returned from the town of Elliot, was controverted by Joseph Hammond, Jr., and others,[1] for the reason stated in the following report of the committee on elections:—

"The only objection, stated in the petition against the election of the members in question, is, that the selectmen were not sworn previous to issuing their warrant for calling the town-meeting, at which the said Leighton and Hammond were chosen on the 3d day of May last. But the committee, on examination, find that the selectmen were duly sworn on the said third day of May, previously to their opening the meeting in said town, for the choice of representatives, which, in the opinion of the committee, was in due season.

Wherefore the committee ask leave to report, and do report, that the said Samuel Leighton and John Hammond, Esquires, are entitled to seats in this house."

The report was agreed to.[2]

Note. This report and decision give a construction to the statute of 1805, c. 26, which, if not warranted by the letter, is conformable to its spirit. This is the only statute, which requires that selectmen shall be under oath. By the 4th section, "the selectmen of the several towns, districts, &c.," are

[1] 34 J. H. 53. [2] Same, 98.

required, "before entering on the execution of their office, to take an oath, or affirmation, before some justice of the peace, or clerk of the town, &c., faithfully to discharge the duties of their office, respecting all elections and the returns thereof."

This statute is entitled "an act in addition to the several acts regulating elections," and the oath prescribed for selectmen, it will be observed, relates exclusively to their "duties respecting elections, and the returns thereof." Taken strictly, the statute doubtless requires that they shall be sworn before they proceed to act in their office at all. But as they have many duties which they do not perform on oath, no good reason can be assigned, why they should not be able to discharge them, without first being sworn to the faithful performance of others. The house, therefore, gave this construction to the statute; that selectmen, before they enter on the execution of the duties of their office respecting elections, must be sworn.

In this case, the warrant was issued for calling the meeting, before the oath was administered to the selectmen; but a defective warrant would not be cured by the selectmen's oath of office. It stands on the town record, and, if illegal, vitiates all the proceedings of the meeting. In framing and issuing a warrant, there is no room for the partiality or corruption of selectmen to operate, and yet evade the law. For this purpose, therefore, there seems to be no more reason that they should be under oath, than that an attorney should be under oath in order to frame a writ and declaration. Far otherwise is it, when they preside at elections, judge of the qualification of electors, and make returns.

CHARLESTOWN.

An election can only be effected by the votes of a majority of the electors, to be ascertained by counting the whole number of ballots given in; and where several persons are to be elected at the same time by general ticket, each piece of paper given in is to be counted as a ballot, whether it have on it the requisite number of names or not.

The election of David Goodwin, Thomas Harris, William Austin, and John Soley, members returned from the town of

Charlestown, was controverted by Abner Rodgers and others, on the ground, that illegal votes were received, and that it did not appear that the members returned had a majority of the votes given in, at the said election.[1]

On the eleventh of June,[2] the committee on elections made the following report in this case[3]:—

"At a meeting of the inhabitants of said town, duly notified and warned, on the third day of May now last past, for the choice of representatives, the selectmen called upon the qualified voters to bring in their votes for five persons, to represent said town in this general court. After the poll was closed, the selectmen proceeded to sort and count the votes, and made declaration that they were as follows:—For David Goodwin, 322 votes; Thomas Harris, 322; William Austin, 321; John Soley, 321; Daniel Tufts, 319; Joseph Miller, 320; Joseph Hurd, 320; Nathaniel Austin, Jr., 320; Joseph Tufts, 320; Timothy Walker, 318; Timothy Thompson, 1; Elias H. Derby, 1: and the selectmen also declared, that the said David Goodwin, Thomas Harris, William Austin, and John Soley, were chosen.

The committee ascertained by testimony, and by the agreement of the parties, that the selectmen obtained the above result by adding together all the above numbers, which made 3205, and dividing that aggregate by five, the number of persons to be voted for as representatives. It appeared, therefore, by this mode of calculation, that there were six hundred and forty-one electors who voted. The selectmen assumed this last number as the true number of electors, and finding that three hundred and twenty-one was a majority of the assumed number, made the declaration before stated.

The committee also ascertained, by full and satisfactory evidence, and by the agreement of parties, that a number of electors gave in ballots, having on them a less number of names than five, and that there were sixty-five names, a part of the above aggregate, given in on ballots, containing a less number than five; that there were six hundred and twenty-

[1] 34 J. H. 23. [2] Same, 129. [3] Same, 134.

eight full ballots, that is, ballots containing five names each, which were given in by six hundred and twenty-eight electors; that there were two ballots given in by two electors, containing two names only on each ballot. The four names, thus given in, deducted from sixty-five, leave sixty-one names to be accounted for, which were borne on ballots containing less than five names each. The necessary result of calculation is, that those sixty-one names could not have been voted for by a less number of electors than sixteen. Adding, then, to the number of electors who voted with full ballots, to wit, 628, the number who must have voted with ballots containing less than five names, to wit, 18, the result is, that 646 electors, at least, actually voted at the choice of representatives by the town of Charlestown, on said third day of May; of which number 324 are necessary to make a choice. And inasmuch as no one of the said sitting members had that number of votes, the committee are of opinion, and do accordingly report, that the said David Goodwin, Thomas Harris, William Austin, and John Soley, Esquires, are not legally chosen, and are not entitled to seats in this house, and that the same be declared vacated."

When this report was taken into consideration:

Mr. Harris contended, that the selectmen adopted the only method which would lead to a correct result. He said the sitting members had each a majority of the votes, though not a majority of the ballots. He thought those electors, who were called upon to vote for five persons to represent the town, and who voted only for one, waived four-fifths of their right, and ought to have credit only for the remainder, in making up the result. The same principle would apply to those, who voted for more than one, and less than five.

Mr. Harris said that he understood the committee to have determined the choice by ballots instead of votes. To show that this was a fallacious mode, he stated the following case:—

Suppose 323 voters vote each for a list of five candidates, A, B, C, D and E.	*votes.*
The aggregate number would be - - - - - - - -	1615
Suppose 323 others vote each for only one, but for different candidates; viz.	
64 vote for F—64 for G—64 for H—64 for I—and 67 for K. - - -	323

As each of the first five candidates has 323 votes, and the others only 64 each, except K, who has 67—or, as the first five have 1615 votes, and the other five only 323—it is clear, and will be allowed, that the first five have a majority of the votes, and are chosen. Yet they have not a majority of the ballots. They have, however, a majority of 259 votes over F, G, H and I: and a majority of 256 over K.

This, Mr. Harris considered as conclusive, to show that the number of ballots is not the criterion, by which the question should be decided.

Mr. D. Sargent, in reply, observed that the selectmen committed an error in adopting the number 5 as a divisor in this case. He said it might sometimes be difficult to ascertain what the divisor ought to be; but in taking the number of ballots as a rule to determine the choice, there could be no mistake. According to the gentleman's doctrine, that each of the sitting members had a majority of votes, and were therefore legally chosen, it would be easy to show, that cases might happen, in which a number of rival candidates would all have a majority of votes: for instance, 50 voters give in their ballots for five candidates each, A, B, C, D and E—and 50 others for four candidates each, F, G, H and I—the whole number of votes would be 450. Divide this number by 5, and the quotient will be 90. Of course, 46 would be said to make a choice; and each of the candidates having 50 votes, they would all be declared chosen.

As to the example put by the gentleman, in which he thought it so clear that the first five candidates would be chosen; it is true they would have a plurality of votes, or each of them a greater number than either of the opposite candidates; but as 323 electors voted for one list, and 323 against it, or for the opposite list, how could it be said they had a majority? If a plurality of votes is to make a choice, then a candidate having two votes would be chosen, though other candidates, however numerous, should be voted for, provided they had but one vote each. But if, as is probable, it is meant, by a majority of the votes, that a certain number of candidates, on the list, had collectively a greater number of votes than certain other candidates, on another list; it would then follow that a large number of candidates, each having one vote only, would be chosen; while a smaller number of candidates, each having more than one vote, would not be chosen. In the Charlestown election, for instance, if 120 of the electors had voted for a list of five persons, A, B, C, D and E, and the remaining 525 electors had each voted for only one person, no two voting for the same, it would then be said, according to this principle, that the list of five were chosen, because they had a majority of the votes. If 300 of the electors had voted for a list of five each, and the remaining 346 for another list of four each; the five would also, in this case, be declared chosen, and the four not, according to the last mentioned principle. But according to the rule adopted by the selectmen, all the nine candidates, in the last instance put, would be elected. The whole number of votes would have been 2884; this number divided by 5 would give a quotient of 576 and a fraction; necessary to make a choice, 289; which is a less number than any of the candidates had. A method which leads to such absurdities, must be wrong.

Mr. Reddington said he considered this case settled by the determination of the house in 1809, in the case of the petition of John Whiting and others, against the election of Messrs. Ware and Mann, who were returned as members from the town of Wrentham.[1] In that case, the two members returned had a number of ballots containing both their names, and a number containing only one of their names. Another candidate's name was found on other ballots. The selectmen severed the names, where they found them on one ballot, before they counted the votes, so that the whole number of ballots, or persons voting, could not be ascertained.

The members' seats were declared vacated, because it could not be known whether they were voted for by a majority of the electors.

The present case is stronger than that; for here the house know, that no one of the members, whose seats are in dispute, had such a majority.

[1] Ante, 70, 71.

The report was agreed to; 163 in the affirmative, 7 in the negative.

"The principle on which the house made its decision," in this case, seems to be simply this; that members returned, must be voted for by a majority of the electors who vote at the choice.[1]

LYNN AND LYNNFIELD.

Transient persons who came into a town a few days before the first day of May, let themselves there as laborers for a few months, and then returned to their homes elsewhere, were held to be ratable polls in such town.

The election of Thompson Burrill, Asa T. Newhall, Richard Breed, Parker Mudge, James Hawkes, and Eleazer C. Richardson, members returned from the town of Lynn and the district of Lynnfield, was controverted by Amos Rhodes and others, on the ground that the said town and district did not contain a sufficient number of ratable polls to entitle them to six representatives.[2]

The consideration of this case was referred to the January session,[3] at which time the committee on elections reported[4]:—

"That the only cause stated in the petition against the election of the sitting members is, that the said town and district did not contain twelve hundred and seventy-five ratable polls, the constitutional number required to entitle the said town and district to elect six representatives.

The petitioners, in support of their allegation, insisted, that transient persons, who came into said town and district a few

[1] One of the members, whose election was in question, in this case, appears to have participated in the debate, without afterwards withdrawing from the house; contrary to the rule of parliamentary practice, which requires a member to withdraw, when matters are under discussion, in which he is personally concerned. The member is allowed to remain until the matter is distinctly before the house, either in the form of a question or otherwise; he is then to be heard in his place, and to withdraw from the house, until the subject be disposed of. In England, this rule does not now apply to the case of a controverted election, in the house of commons; the report of the committee thereon being made final and conclusive by statute, without the intervention of the house.

[2] 24 J. H. 9. [3] Same, 153. [4] Same, 377.

days previous to the first day of May last, and let themselves to labor there for a few months, and immediately after their service returned to their homes in other towns and other states, were not ratable polls. But, inasmuch, as the committee are of a different opinion, and as by adding all such cases to the number of undisputed ratable polls, the result will exceed the constitutional number, the committee report, that Thompson Burrill, Asa T. Newhall, Richard Breed, Parker Mudge, James Hawkes, and Eleazer C. Richardson, were duly elected members, and are entitled to seats in this house."

The report was agreed to.

MARBLEHEAD.

Question—whether persons, in the naval or military service of the United States, are ratable polls.

The election of John Bailey, Joshua Prentiss, Jr., William Story, James Smith, Richard Prince, Jacob Willard, and Samuel W. Phelps, members returned from the town of Marblehead, was controverted by John Hooper and others, on the ground, that the said town was not entitled, by the number of ratable polls therein, to send seven representatives.[1]

The petition in this case was presented at the January session,[2] and on the twenty-fourth of February, the committee on elections reported thereon, as follows:—

"That a meeting of the inhabitants of said town was holden on the thirteenth day of May last past, for the purpose of choosing representatives from said town to the general court, at which meeting, the said inhabitants did choose, at one balloting, the members returned as representatives of said town.

In this case, the assessors of the said town and the sitting members produced, before the committee, lists of all the persons in said town, whom they alleged to be ratable polls, on the

[1] 34 J. H. 161. [2] Same, 377.

first day of May last. The said lists contained the names of sixteen hundred and fourteen persons. Respecting ninety-seven of the said names, the committee believe there can be no dispute; and that they ought not to have been borne on the said lists; that a further number of seventy-four are persons, who, on the first day of May last, were in the service of the United States, as seamen and soldiers, and who had enlisted before that day, and the greater part of whom still continue in said service. The committee, being of opinion, that such seamen and soldiers were not ratable polls in said town of Marblehead, added their number to the number of ninety-seven, above mentioned, making in the whole one hundred and seventy-one names, to be deducted from the number claimed as aforesaid; leaving the number of fourteen hundred and forty-three ratable polls in said town of Marblehead on the said first day of May. And inasmuch as fifteen hundred ratable polls are required by the constitution, to enable any town to choose seven representatives in this house, and as the town of Marblehead did not contain that number, the committee are unanimously of opinion, and do accordingly report, that the said supposed election of John Bailey, Joshua Prentiss, Jr., William Story, James Smith, Richard Prince, Jacob Willard, and Samuel W. Phelps, was void, and that their seats ought to be declared vacated."

The report was read, and after debate thereon, it was ordered, that the subject subside for the present.

Mr. Willard, of Marblehead, then submitted the following order, which was assigned for consideration the next day, and in the meantime, committed to the committee on elections.[1]

"Ordered, That the justices of the supreme judicial court be requested as soon as may be, to give their opinion on the following questions, namely:—

Whether citizens of the United States, belonging to any town in this commonwealth, and having families, property, or their birth or legal settlement therein, by entering the military or naval service of the United States, either as officers, non-com-

[1] 34 J. H. 378.

commissioned officers, or privates, do thereby become exempt from poll taxes? and whether they thereupon cease to be 'ratable polls,' within the intent and meaning of the constitution of this commonwealth; and whether a representation, predicated upon a competent number of ratable polls, including some of the above description, is unconstitutional? and whether the assessment and collection of taxes against such persons, provided the same be made without personal arrest, is unlawful or actionable?"

On the twenty-fifth of February, the report on the Marblehead election was again taken up, and the consideration thereof again ordered to subside for the present.

A committee was then appointed to consider, whether any and what provision ought to be made by law, to prevent those persons from voting, who have enlisted into the military service of the United States, in towns in which such persons would not, by the constitution and laws of the state, have a right to vote, if not so enlisted.[1] This committee do not appear to have made any report.

On the twenty-eighth of February, the last day of the session, the committee on elections reported, that it was not expedient to submit to the supreme judicial court the questions proposed by the member from Marblehead.[2]

SULLIVAN, SANFORD, STEUBEN.

[The elections in the first two of these towns were controverted, but there does not appear to have been any report or action of the house thereon.

The election in Steuben was questioned on the ground of a deficiency of ratable polls, and confirmed.]

[1] 34 J. H. 383. [2] Same, 405.

CASE OF DANIEL MERRILL, MEMBER FROM SEDGWICK.

Question,—as to the right of a member, who has removed into another state, to retain his seat.

Mr. Whitman, of Boston, moved, that a committee be appointed to inquire whether the Rev. Daniel Merrill, the member from Sedwick, in the county of Hancock, is entitled to hold his seat; he having since his election removed into the state of New Hampshire, and become an inhabitant of that state, The consideration of this motion was referred to the next day, at which time it was withdrawn by the mover.[1]

[1] 24 J. H. 240, 245. See the cases of *John Shepley*, member from Fitchburg, 1825—26, and of *Emory Burpee*, member from Sterling, 1838.

1814—1815.

COMMITTEE ON ELECTIONS.

Messrs. *Nicholas Tillinghast*, of Taunton, *Jairus Ware*, of Wrentham, *Oliver Crosby*, of Brookfield, *Charles Davis*, of Boston, *James Brown*, of Lexington.

REPORTER.

Theron Metcalf, Esq., of Dedham.

DIGHTON.

If, in consequence of electors voting twice, either intentionally or by mistake, it becomes uncertain whether the person declared to be elected received the votes of a majority of the voters then voting, the election is void.

The election of Leonard Hathaway, the member returned from the town of Dighton, was controverted by William Bay-

lies and others, on the following grounds, alleged in their petition, namely:—

That the meeting was conducted illegally and fraudulently; that the selectmen kept it opon one hour and more, after they had sorted and counted the votes, and during that period received several additional votes; that they destroyed several votes; that after counting the votes, they returned them into the box, apparently with an intention of counting them again; that they rejected one legal voter; and that several persons put into the box more votes than one.

The committee on elections, on the eighth of June, reported on this case as follows[1]:—

"A town meeting was legally holden in said town, on the ninth day of May last, for the choice of a representative to the present general court; at which the selectmen of said town proceeded to receive votes, and did receive two hundred and fifty-four votes, and declared that Leonard Hathaway, the sitting member, had one hundred and twenty-seven votes, and Nathaniel Wheeler one hundred and twenty-seven votes, and that there was no choice.

The committee further find, that the selectmen received the vote of a Mr. Tubbs, and refused to receive the vote of one Ebenezer T. Lincoln, which was for Nathaniel Wheeler, on the apprehension that he had not the property required by the constitution, to entitle him to vote in said election. The committee are satisfied that Mr. Tubbs was not legally qualified to vote in the said election, he not having been a resident in said town for one year next preceding; but they are of opinion, from an inventory of the property of said Lincoln exhibited, that he was constitutionally qualified to vote in the choice of a representative.

The committee further find, that, on the declaration being made by the selectmen, that there was no choice, they proceeded again to receive votes for a representative, which, on being sorted and counted, were for Leonard Hathaway one hundred and thirty-six votes, and for Nathaniel Wheeler one

[1] 36 J. H. 117.

hundred and thirty-four votes, and that Leonard Hathaway was declared chosen, 'if the meeting was legal.' The committee, however, have strong reasons to believe, from the depositions of sundry persons present at said meeting, that several persons voted twice, either intentionally or by mistake, at said balloting, whereby it is rendered wholly uncertain whether the said Hathaway had a majority of the votes of the voters then voting in said election. And inasmuch as it is thus uncertain from the foregoing statement, whether a majority of the legal voters present at said meeting, and voting in said election, were for the said Leonard Hathaway,—as well as for the reasons first stated,—the committee ask leave to report, and do report, that the supposed election of the said Leonard Hathaway is void, and that he is not entitled to a seat, and that the same ought to be declared vacated."

The report was agreed to, by a vote of 99 to 8.

Nathaniel Wheeler, the candidate voted for as abovementioned, then (on the same day) petitioned the house that he might be admitted to a seat, on the ground, that he had been duly elected.[1]

The commitree on elections, to whom his petition was referred, reported at the January session following, that no evidence had been produced before them to show that the petitioner had been elected a member from the town of Dighton, and, therefore, that he have leave to withdraw his petition.[2] The report was agreed to.

[The committee having found that one vote was to be added to the whole number, at the first balloting, and one to be deducted therefrom, the aggregate would remain the same, and the question would be, for which of the candidates, respectively, these votes were to be counted. Lincoln's vote would have been given, and was therefore to be counted for Wheeler. If then Tubbs's vote had been given for Wheeler, and included in the vote counted for him, it being deducted therefrom, Wheeler's vote would have stood as before, and there would have been no choice. If on the other hand,

[1] 34 J. H. 118. [2] Same, 465.

Tubbs's vote had been given for Hathaway, and included in the votes counted for him, Wheeler's vote would have been increased by Lincoln's vote to 138, and Tubbs's vote being deducted from Hathaway's vote, the latter would have been reduced to 136, and Wheeler would consequently have been elected. When, therefore, the committee, upon Wheeler's petition, reported, that no evidence had been produced before them to show, that the petitioner had been elected, it was probably upon the ground, that he had been unable to prove that Tubbs voted for Hathaway.]

SPENCER.

Of residence, within the meaning of the constitution.

The election of James Draper, Jr., the member returned from the town of Spencer, was controverted by Frederick Stowe and others,[1] on the ground, stated in the following report[2] of the committee on elections, which was made on the sixth of June, and agreed to the same day, namely:—

"The only cause stated in the petition against the election of the sitting member is, that one Walton Livermore was permitted to vote at said election, who had not resided in said town one year next preceding, and that as said member had a majority of but one vote, if said Livermore had not voted, there would have been no choice.

The committee find, that Livermore removed from Dorchester to Spencer, with his effects, on the seventh day of April, 1813; that he tarried there eight days, entered into a copartnership in trade, hired a house and store, procured provisions for housekeeping; that he was absent from Spencer about one month after the 15th day of April, 1813, a part of the time in Dorchester, and a part of the time in Boston, purchasing goods for his store; that he then returned to Spencer, and has resided there ever since.

[1] 35 J. H. 9. [2] Same, 102.

And the committee are unanimously of opinion, that said Livermore had a constitutional right to vote at such election, and do accordingly report, that James Draper, Jr., Esq., the sitting member, is entitled to a seat."

NOTE. By the constitution, chap. 1, sec. 3, art. 4: "every male person, being twenty-one years of age, and resident in any particular town in this commonwealth for the space of one year next preceding, having a freehold, &c.—shall have a right to vote in the choice of a representative or representatives, for the said town."

The words "resident," and "inhabitant," in the state constitution, are supposed, generally, to have the same meaning. It is so at common law. The question often arises, what constitutes a resident or inhabitant?

The opinion of the committee, which was confirmed by the house, in the above case, comes precisely within the description of a resident or inhabitant, given by judge Peters, of Pennsylvania, in the case of the *United States* vs. *the Penelope*, namely: "An inhabitant, or resident, is a person coming into a place with an intention to establish his domicile or permanent residence, and in consequence actually resides: under this intention, he takes a house, or lodgings, as one fixed or stationary, and opens a store, or takes any step preparatory to business, or in execution of this settled intention."—2 Peters's Admiralty Decisions, 450.

The constitution provides, that a person shall be considered an inhabitant "where he dwelleth or hath his home." Walton Livermore was considered, by the committee and house, as dwelling and having his home in Spencer, within the meaning of the constitution, from the 7th day of April, 1813, to the day of Mr. Draper's election.

NANTUCKET.

At a meeting for the choice of a representative, the selectmen refused to put or hear debate upon a motion, regularly made and seconded, that no representative should be sent, and ordered the voters to bring in their votes. The voters insisting upon their right to debate the motion, the chairman of the selectmen ordered the sheriff to read the riot act, which was done, and thereupon about half of those present left the meeting. During these proceedings and afterwards votes were received, being handed from one to another till they reached the ballot box. An election so made was held void.

The election of Micajah Gardner, returned a member from the town of Nantucket, was controverted by William Coffin and others,[1] on the ground, that the selectmen, at the meeting held in said town for the choice of a representative, refused to put a motion regularly made and seconded, that the town should not send any representative, and that, in other respects, the meeting was conducted in an irregular, illegal and tumultuous manner. They also alleged, that it was not warned in the manner prescribed by a vote of the town, passed November 18, 1725–6, and never since varied from, except in one or two extreme cases.

The committee on elections made the following report in this case, on the eighth of June[2]:—

"A meeting was holden in said town, on the seventh day of May now last past, for the choice of a representative or representatives from said town to the present general court; the proceedings at said meeting were orderly, until a motion was regularly made and seconded, that the town should not send any representative the present year, and several of the voters attempted to debate on that motion, which the selectmen, by their chairman, prevented, by declaring, that the meeting was not a meeting for debate, and that he could not receive the motion nor permit any debate to be had thereon; alleging that the motion was not contemplated by the warrant nor by the law; and precipitately left his seat and ordered the voters to bring in their votes. This refusal and conduct pro-

[1] 35 J. H. 14. [2] Same, 120.

duced a very considerable degree of excitement in the meeting; the voters insisting upon their right to have the motion debated and decided, and the selectmen persisting in their refusal. The committee further report, that while the voters were insisting upon their rights as aforesaid, the chairman of the selectmen ordered the sheriff of the county to read the riot act, which was read by him accordingly; by which all the persons present were ordered to disperse. There were about four hundred persons present in and about the house, in which the meeting was held, about two hundred of whom obeyed the command of the riot act. While the riot act was reading, and after it was read, the selectmen received and continued to receive votes, (which were given in a most singular manner, being handed from one to another, until they arrived at the ballot-boxes) and declared Micajah Gardner to be chosen by all the votes excepting one.

The committee further report, that the disorder and confusion, which took place at the meeting, are to be attributed solely to the unconstitutional and illegal refusal of the selectmen to sustain the motion and hear debate thereon as aforesaid; and that there was no justifiable cause for ordering the riot act to be read, no riot existing at the time, nor any disorder, except what was produced by the conduct of the selectmen themselves.

After the decisions of the house of representatives,[1] and of the supreme judicial court,[2] that the right to send a representative is a corporate right, vested in towns, which right, of course, it is at the option of a majority of legal voters, present at a town-meeting for the choice of a representative, to waive or exercise; the committee cannot but express their surprise that the selectmen of Nantucket should have deprived the inhabitants of that town of that right.

The sitting member was not present at said meeting, and had no concern in the transaction.

From the above facts, evincing that the meeting aforesaid was conducted by the selectmen of said town in an an uncon-

[1] See the case of *Roxbury*, 1813–14, ante, 157. [2] 7 Mass. Rep. 526; ante, 117.

stitutional and illegal manner, the committee report, that the supposed election of Micajah Gardner as a representative from the town of Nantucket to this house, on the seventh day of May now last past, was utterly void and of no effect, and that his seat be declared vacated."

The report was agreed to by a vote of 95 to 6.

An order was subsequently passed, directing the committee on accounts to receive and allow Mr. Gardner's account for travel as a member of the house.[1]

DEDHAM.

When a member's qualification as to property is questioned, the burden of the proof is on the petitioners.

The election of Erastus Worthington, one of the members returned from the town of Dedham, was controverted by Samuel Swett and others, on the ground that he was not qualified in respect to property, as required by the constitution.[2]

The committee on elections, at the January session, made the following report,[3] in this case, which was read and agreed to:—

"The only objection, stated against the said Worthington's election, is, that he is not qualified according to the constitution, to sit as a member, not having, for one year preceding his election, been seised in his own right of a freehold of the value of one hundred pounds within said town, or any ratable estate, to the value of two hundred pounds; but inasmuch as no evidence has been produced to the committee by said petitioners showing that he was not constitutionally qualified in that respect: the committee ask leave to report, and do report, that the said Erastus Worthington, Esq., was duly elected, and is entitled to his seat."[4]

[1] 35 J. H. 144. [2] Same, 18. [3] Same, 465.
[4] See the case of *Pembroke*, 1786-7, ante, 21.

LANESBOROUGH AND NEW ASHFORD.

The inhabitants of a district, whose act of incorporation authorized them to join with a neighboring town in the choice of representatives, but did not require the selectmen of the latter, in any way, to give notice to the inhabitants of the district of the time and place of meeting for that purpose, were held not to be entitled to vote in such choice, unless they were legally warned to attend the meetings therefor; although they had been accustomed, for many years after the act, to attend the meetings of the town for the choice of representatives, without any warrant being previously issued by the selectmen of the district for the same; and although it had been the practice of the selectmen of the town, for some years, to give seasonable notice of such meetings to the selectmen of the district, who thereupon issued their warrants accordingly to the inhabitants of the same: It was held, also, that if no legal notice of a meeting of the town for the choice of representatives was given to the inhabitants of the district in consequence of a neglect of the selectmen of the town to give information thereof to the selectmen of the district, the town might nevertheless refuse to receive the votes of the electors of the district, (although after receiving them at one balloting) and might alone choose a representative.

Where the return of a representative, elected by the votes of a town and a district annexed to it for the purpose of electing representatives, was signed by the selectmen of the town only, the house directed the member to procure a certificate of the selectmen of the district.

The election of Henry Hubbard, returned a member from the town of Lanesborough and the district of New Ashford, was controverted by the selectmen of New Ashford, and by Samuel H. Wheeler and others, on the ground, that at the meeting of the said town and district, for the choice of a representative, the votes of New Ashford were refused by the selectmen of Lanesborough. The seat of Mr. Hubbard was also claimed by Henry Shaw, who alleged himself to have been elected by a majority of the votes given in at the said meeting.[1]

The committee on elections, at the January session, made the following report in this case, which was agreed to:—

"That by an act of this commonwealth, passed the 26th day of February, 1781, (st. 1780, c. 20,) a certain tract of land called New Ashford, in the county of Berkshire, was incorporated into a district, by the name of New Ashford, and vested with all the powers of towns in this commonwealth, that of sending a representative to the general court excepted,

[1] 35 J. H. 11. [2] Same, 420.

'but for that purpose had liberty granted them to join with the town of Lanesborough;' that availing themselves of that liberty, the inhabitants of New Ashford joined with the town of Lanesborough, in the choice of a representative for said town and district, from the time of its incorporation to the ninth of May last, without any objection from said town; that it was the practice of the inhabitants of said district, who were qualified to vote in the choice of a representative, to repair to Lanesborough, and give in their votes for a representative promiscuously with the legal voters of Lanesborough, till the year 1804, no warrant previously to that time ever having been issued by the selectmen of New Ashford to notify the voters therein of the meeting; that from said time to the present year, warrants have been issued for said purpose, and seasonable notice of the meeting used to be given by the selectmen of Lanesborough to the selectmen of New Ashford until the present year, when no such notice was given; that the practice has been for the selectmen of both town and district to preside at said meeting, and both to sign the certificate of the person elected.

The committee further report, that, pursuant to a warrant issued by the selectmen of Lanesborough, the qualified voters therein met on the second day of May last, for the choice of representatives; those of New Ashford met with them for the same purpose. The selectmen of Lanesborough called for and collected the Lanesborough votes, and then handed the hat, with the votes therein, to the selectmen of New Ashford, for them to collect their votes, but on being sorted and counted, there resulted no choice. A debate ensued on the expediency of voting again, but the meeting was adjourned by the joint vote of the town and district, to the ninth day of May following.

The committee further report, that on said day the town and district again met for the purpose aforesaid, and after the meeting was opened, and previously to the votes being called for, a gentleman of Lanesborough proposed to the meeting, that to avoid further difficulty, they should proceed and elect

both of the candidates for representatives, who had the principal part of the votes of the former meeting. This proposition was objected to by several persons present, upon which the Hon. Mr. Hubbel, of Lanesborough, stated, that unless the proposition was acceeded to, the votes of New Ashford should not be received and counted with the votes of Lanesborough in the choice of a representative, as the town of Lanesborough was determined to choose one by themselves, after which the district might choose another without opposition; this declaration he said he made to the meeting, at the request of a number of gentlemen of said town, among whom were the selectmen, who had previously agreed to pursue this course. The selectmen of Lanesborough then called for the votes of the town, which being sorted and counted, there were for Henry Hubbard Esq., 106 votes, Henry Shaw, 88 votes, scattering 5; they then declared Henry Hubbard, Esq., elected by a majority of 13 votes, and gave the hat, in which they were received, to the selectmen of New Ashford, who collected their votes, and calling on the selectmen of Lanesborough to assist in counting them (which they refused to do) found for Henry Shaw, 41 votes, Henry Hubbard, 4, scattering 1; they then added the votes of town and district together, and declared Henry Shaw elected by a majority of 13 votes, and thereupon made out a certificate of his election, and requested the selectmen of Lanesborough to sign it with them, which they also refused.

The committee further report, that for want of information of the time of the meeting in Lanesborough, no warrant was issued by the selectmen of the district to notify the voters therein, and no notice other than verbal was given them of the meeting.

The committee do further report, that they have examined the act giving liberty to said district to join with Lanesborough in the choice of a representative, as well as other acts incorporating other districts with similar privileges; and as it has been determined by the justices of the supreme judicial court, that the right a town has of sending a representative is a corporate right, which decision has been recognized by this

house, so the committee consider that the right of a district to join with a town in choosing one must also be corporate, and the legal voters therein must exercise their privilege of voting as members of their corporation. And as a corporation cannot legally perform any corporate act unless its members are duly notified and convened, and it appearing to the committee that the qualified voters in said district, at the meeting aforesaid, were not so convened, no warrant for notifying said meeting having been issued by the selectmen thereof, as before mentioned, consequently their votes, in the opinion of the committee, could not legally be received and counted at said election; but as it appears that Henry Hubbard, Esq., had a majority of the votes of the qualified voters of the town of Lanesborough, duly notified and convened for the choice of a representative, on the said ninth day of May, as before stated, the committee ask leave to report, and do unanimously report, that the said Henry Hubbard, Esq., was duly elected, and is entitled to his seat."

NOTE. The colony charter, granted by Charles I., did not distinctly authorize the freemen of "Massachusetts Bay," to elect representatives, but in general terms made it lawful for the governor or the deputy governor and the assistants and freemen assembled in general court, or other court specially summoned for the purpose, to make ordinances and laws for settling forms of government and magistracy, and such officers as they might find "fit and necessary for said plantation."

The colonial ordinances respecting representatives, which passed in 1636, '38, and '53, and were formed into one in 1658, made it "lawful for the freemen of every town to choose (by papers) deputies for the general court." Then followed a provision: "No town shall send more than two deputies, and no town that hath not to the number of twenty freemen shall send more than one deputy; and such plantations as have not ten freemen shall send none, but such freemen may vote with the next town, in the choice of their deputies, till this court take further order." The manner, in which the freemen of such plantations should be warned to meet with those of

an adjoining town, is not directed in these ordinances. Nor does it very clearly appear, from any of the colony laws, how town meetings were warned. Nothing more definite and particular is to be found, than that it was the duty of the constables of every town, to "call together their freemen," to give in their votes for magistrate.

The province charter, granted by William and Mary, ordained that the great and general court or assembly should "consist of the governor and council or assistants for the time being, and of such freeholders of the province, as should be elected by the freeholders, and other inhabitants of the respective towns or places." And each town and place was thereby "empowered to elect and depute two persons and no more, to serve for, and represent them respectively, in the said great and general court or assembly." This charter also gave authority to the general court, "from time to time, to direct, appoint, and declare, what number each county, town, and place, should elect and depute to serve for, and represent them respectively." By virtue of this authority, the general court, in 1692, passed an act, which contained the following clause: "That henceforth every town within this province, consisting of the number of forty freeholders, and other inhabitants, qualified by charter to elect, shall, and hereby are enjoined to choose and send one freeholder as their representative; and every town consisting of the number of one hundred and twenty freeholders and other inhabitants, qualified as aforesaid, or upwards, may send two such representatives; and each town of the number of thirty freeholders and other inhabitants qualified as aforesaid, or upwards, under forty, are at liberty to send one or not. And all towns under thirty freeholders, may send one to represent them, or join with the next town, in the choice of their representatives, they paying a proportionable part of the charge." —Stat. 4. of William and Mary, c. 19.

The ratio of representation was subsequently altered, but no new provisions were introduced respecting the union of towns and districts in the choice of representatives.

The statute of 4 William and Mary, cited above, also di-

rected, that when the governor should see fit to convene a general court, writs should issue from the secretary's office, directed to the sheriffs or marshalls, commanding them to send precepts, to the selectmen of the several towns, to assemble the freeholders, &c., to elect one or more representatives, according to their numbers; and the selectmen were directed to preside at the meetings, and to make return, under their hands.

A previous statute passed in the same year, had made it the duty of the constables of the several towns, to warn all town-meetings, having a written order therefor from the selectmen.

It does not appear, however, from the province laws, in what manner "towns under thirty freeholders" were to be warned, when they chose to "join with the next town in the choice of their representatives."

But the legislature, under the last charter, incorporated several new towns, "with all the powers, privileges and immunities of other towns, that of sending a representative to the general assembly only excepted." In some instances, the new towns were to have no vote in the choice of representatives, as Belchertown, Shutesbury, and Coleraine, incorporated in 1761. In others, a right was granted to them to join with a contiguous town in the choice of a representative, as Great Barrington in the same year, Wilbraham in 1763, and Fitchburg, in 1764. In these cases, the selectmen of the old towns, with which the new had liberty to unite, were directed to issue their warrant to the constables of the new town, requiring them to notify the inhabitants of such town, of the time and place of meeting for the choice of a representative.

In many instances, under the provincial charter, the legislature incorporated districts, and invested them with all the powers of towns, except that of sending a representative. Some of these districts were left entirely without a voice in the election of a representative, as Ware and Natick. Others had liberty granted them to join for that purpose with a neighboring town, as Oakham, Pepperelborough, South Brimfield, Stoughton. In these cases, the statutes incorporating the

districts directed the mode in which they should be notified of the time and place of election. The mode was not uniform. In the majority of statutes, which have been examined, the selectmen of the town were directed to issue a warrant to the constable of the district, requiring him to notify the inhabitants of the district. Some statutes directed the selectmen of the town to give notice to the clerk of the district, of the time and place of meeting, who was to set up notifications thereof in some public place in the district. Other statutes directed the selectmen of the town to give notice to the inhabitants of the district.

Under the constitution, the legislature have also incorporated districts, with all the powers of towns, except that of sending a representative. For this purpose, they have, with a few exceptions, (as Plainfield, Bethlehem,) had liberty to unite with an adjoining town. And in all cases that have been found, except that of New Ashford, the statute directs the selectmen of the town, to give notice of the time and place of meeting to the district, and points out the manner. In some cases, they are to issue their warrant to the constables of the district, requiring them to notify the inhabitants; in some, to give notice in writing, to the selectmen of the district, "to the intent that they may issue their warrant to the constables, to warn the inhabitants;" in others, to give similar notice to the clerk of the district.

The act erecting New Ashford into a district was the first of the kind that passed after the adoption of the constitution, and by it, "the said district is invested with all the privileges, powers and immunities that towns in this commonwealth by law do or may enjoy, that of sending a representative to the general assembly only excepted, but hereby have liberty granted to them to join with the town of Lanesborough for that purpose." No provision is made in this act, for giving notice to the inhabitants of New Ashford, of the time and place of meeting for the choice of representatives, nor is there any general statute, which provides for such cases.

The constitution secures to "every corporate town, contain-

ing one hundred and fifty ratable polls," the right to elect a representative. This right is corporate, and has always been held to be incident to towns incorporated since, as well as those which existed before the adoption of the constitution. And it may be questionable, whether under the province charter, the legislature had authority to prohibit a town incorporated by them, from sending a representative. The charter conferred the right as explicitly as the constitution. And it is not easily perceived, how the right could be legitimately restrained under the former, more than under the latter. Indeed, the provincial legislature, in 1775, declared all such restraining acts, even in the case of districts as well as towns, to be "against common right, and in derogation of the rights granted by the charter." With respect to districts, the spirit of the times seems to have carried the declaration too far,—for these corporations had no more rights under the charter, than they have under the constitution,—and it has never been contended that, by the constitution, districts, when incorporated, have of course a right to send a representative to the legislature. It is believed, however, that towns have always had this right, from the time of the first colonial ordinances on the subject.

Had the statute incorporating the district of New Ashford, made it the duty of the selectmen of Lanesborough, in any way, to give notice to the inhabitants of the district, of the time and place of meeting for the choice of a representative, their neglect of such duty might have presented a different question to the consideration of the committee and the house. But as no such legal duty was imposed on them, and as the town of Lanesborough, containing the requisite number of ratable polls, had a right, independently of its connexion with the district, to send a representative; as the meeting of the inhabitants of the town was legally warned (and no question was made respecting the legality of the adjournment); as it is clear that the inhabitants of the district could not legally vote, without being legally warned; there seems to be no room for doubt concerning the correctness of the report of the com-

mittee, and the decision of the house. The neglect of the district could not deprive the town of a right, which the constitution had secured to it, before the district had a corporate existence.

When a town and district unite in the choice of representatives, the practice has been, as far as is known, for the selectmen of both to join in making and signing a certificate and return of the election. This practice has been sanctioned by the house of representatives. In 1812, the return from the town of Buckfield, was not signed by the selectmen of the district of Hiram, which is annexed to that town for the purpose of choosing a representative, and the house directed the member returned, to produce a certificate of the selectmen of the district, in order to hold his seat. And if the inhabitants of New Ashford had been legally warned, the return in the above case, signed by the selectmen of Lanesborough alone, would have been insufficient.

NEWBURY.

A town having voted to send six representatives, to be voted for on one ticket, some of the electors brought in their ballots for the whole number; some for a less number; some six separate ballots with one name on each; and one voter, after having carried in a ballot with one name on it, carried in a second with five names on it. After the votes were thus received, they were cut and severed before they were counted. It was held, that the manner, in which the votes were received, dealt with and counted, rendered it impossible to determine the number of persons, who voted in the election, and that the election was therefore void.

The election of Daniel Emery, Silas Little, John Osgood, Ebenezer Hale, Josiah Little, and Oliver Pilsbury, members returned from the town of Newbury, was controverted by Nathaniel Emery and others, on the ground, that the manner of voting at the election was such as rendered it impossible to ascertain how many persons voted, and consequently that it was uncertain, whether any or either of the members returned received a majority of the votes.[1]

[1] 35 J. H. 20.

At the January session, the committee on elections made the following report, which was agreed to, namely[1]:—

"A meeting, duly convened for the choice of representatives from said town, was there holden on the twelfth day of May last; at which it was voted to send six representatives, and also voted, that the votes should be brought in for the same on one ticket. The selectmen presiding received an unknown number brought in that manner, and some with three, four, and five names thereon, and from some voters they received six separate ballots with one name on each; and one voter after having carried in a ballot for one representative, (not knowing the manner of voting) was afterwards permitted to carry in another ballot, with five names. After the votes were received as aforesaid, they were principally cut and severed, before they were counted.

The committee further report, that from a copy of the record of the meeting, it appears that after the votes were severed as aforesaid and counted, there were for Daniel Emery, 164 votes; Silas Little, Esq., 168; John Osgood, Esq., 127; Col. Ebenezer Hale, 517; Josiah Little, Esq., 109; Major Oliver Pilsbury, 138; John Rollins, 85; Capt. David Little, 22; Capt. Thomas Carter, 24; Moses Little, Esq., 2; Jacob Little, 2; Richard Pike, 5; Nathaniel Moody, 2; Nathaniel Emery, 1; Jacob Morril, 2; John Obrien, 1; Edmund Little, 1; Moses Dole, Jun., 1; Paul Adams, 1. And that the gentlemen having the six highest numbers, in the above list, were considered as chosen.

The committee further report, that by several depositions produced from persons attending the meeting, it appeared to be their belief and opinion, that not more than two hundred persons voted at said election, but they mentioned no circumstances, either by counting or otherwise, which led them to such belief.

The committee do further report, that the irregular manner in which the ballots were received, as also the severing them before they were counted, rendered it impossible to determine the number of persons voting in said election, and thereby

[1] 35 J. H. 432, 446.

ascertain what number constituted a majority; and as all elections of members of this house should ever be certain, and it appearing to the committee from the proceedings aforesaid, that it is uncertain whether the members returned were actually elected, not knowing whether each of them had a majority of the votes, the committee ask leave to report, and do unanimously report, that the said Daniel Emery, Silas Little, John Osgood, Ebenezer Hale, Josiah Little and Oliver Pilsbury, Esquires, were not legally chosen, and are not entitled to seats in this house, and that the same be declared vacated."

Note. The principal ground of the decision, in the foregoing case, was the uncertainty of the election.

A note would not have been subjoined in this place, but at the request of some very intelligent members of the house, who expressed an apprehension that the facts stated in the above report would not, upon strict examination, warrant the conclusion, which the committee have drawn.

The whole number of votes, according to the report, must have been one thousand and twelve. Had the common method of ascertaining the majority in such cases been adopted, namely: dividing the whole number by the number which the town had voted to send, the result would have been, that no one had a majority; 168 (the highest number) being a fraction less than one-sixth. Such a method, however, was proved to be fallacious, and decided to be improper, in the case of the Charlestown election, in 1813.

In the above case, it is obvious to observe, in the first place, that the number of tickets, which contained six names, was unknown. It might have been only twenty, or it might have been one hundred and sixty-eight. In the next place, there is the same uncertainty as to the number of tickets, which contained three, four, and five names; with the still further uncertainty, respecting the number of those who gave in "six separate ballots, with one name on each." And though no suspicion of fraud or unfairness was suggested, yet, for aught that appears, those who gave in six separate ballots might have given them all for one candidate. It is demonstrable, that if

this had been done by as many as twenty-five voters, it would have overbalanced the whole number (149) given for those, who were not returned as elected. It would seem, that nothing could be more plain than that a majority of votes might thus have been given by a minority of the voters. Many other illustrations, equally strong, are suggested by the facts stated in the report.

Although there is the highest degree of probability, that those, who were returned, were chosen by a majority of the electors, yet, the house decided that nothing short of legal certainty would entitle them to retain their seats. The case of the Wrentham election in 1809 (*ante*, 70), which was the same in principle, was decided in the same manner, and considered as a binding precedent.

After the acceptance of the report, it was ordered, that the committee on the pay roll be directed to make up the travel and attendance of the members from Newbury, during the present session of the general court, to this day (February 25th) inclusive.[1]

CASE OF SOLOMON AIKEN, MEMBER FROM DRACUT.

The office of chaplain in the army of the United States is incompatible with that of representative.

A committee was appointed at the January session, to inquire whether any members of the house held any office under the authority of the United States, incompatible with their holding a seat in the house, with power to send for persons and papers.[2]

The committee reported, on the third of February, that the member from Dracut, the Rev. Solomon Aiken, had been appointed, by the president, a chaplain in the service of the United States; that he had accepted the appointment, and entered upon the duties of his office; and that, in their opin-

[1] 35 J. H. 446. [2] Same, 266.

ion, such appointment and acceptance were incompatible with his holding a seat in the house.

The report was considered and accepted, and the seat of Mr. Aiken declared vacated;[1] and

It was then ordered, that the committee on the pay roll make up his pay for travel and attendance, as a member, to the third of February, inclusive.

[Mr. Aiken was returned a member the next year, and again excluded, for the same cause, by a vote of 264 to 12.[2]]

[1] 35 J. H. 317; 327. [2] See 36 J. H. 10, 26, 38.

1815—1816.

COMMITTEE ON ELECTIONS.

Messrs. *Dudley L. Pickman*, of Salem, *Jairus Ware*, of Wrentham, *Charles Davis*, of Boston, *James Brown*, of Lexington, *Jonathan H. Lyman*, of Northampton.

REPORTER.

Theron Metcalf, Esq., of Dedham.

NANTUCKET, SHARON.

The right to send a representative is a corporate right, which towns may exercise or waive, at their pleasure; and, therefore, if selectmen refuse to put a motion, regularly made and seconded, in town-meeting, "that the town send no representative," or "to see if the town will choose a representative;" but call for and receive votes for a representative, an election so made is void.

The election of Micajah Gardner, returned a member from the town of Nantucket, was controverted by William Coffin, and others,[1] and the election of Ziba Drake, returned a member from the town of Sharon, was controverted by Nathaniel Morse and others,[2] on the ground, that, at the meetings held in those towns respectively, motions were regularly made and

[1] 36 J. H. 12. [2] Same, 39.

seconded, in the town of Nantucket, "that the town send no representative," and in the town of Sharon, "to see if the town would choose a representative," which motions the moderators of the said several meetings refused to put to vote, but thereupon immediately called for and received votes for representatives.

The petitions in these cases, were presented at the May session, and referred to the committee on elections, who made the following report thereon[1]:—

"Town-meetings were duly had and convened in said towns of Nantucket and Sharon, in the month of May last, for the choice of representatives to the present general court. At each of the said meetings, motions were regularly made and seconded (in effect), that each of the said towns should not send representatives to the general court the present year; and the moderators of the several meetings refused to submit the questions for decision, urging that they were prohibited by the constitution and laws of the commonwealth, from putting motions of that nature. It appearing to the committee, that different opinions are formed in different parts of the commonwealth, respecting the question whether a town may constitutionally and legally vote not to send a representative to the general court; notwithstanding the decision of former houses of representatives on this subject, and the opinion of the honorable the justices of the supreme judicial court, which seems to be expressed in the opinion they gave on the question respecting aliens, submitted to them by a former house of representatives; and inasmuch as the present question was not then directly before the honorable judges, and the committee having had before them some evidence that one of the justices of the supreme judicial court, at the last session of the same, holden in Boston, in the county of Suffolk, and for the counties of Suffolk and Nantucket, on the trial of an indictment, then and there pending against the selectmen of Nantucket, did express an opinion, in some degree contrary to the one incidentally given and expressed as aforesaid; it has, in the opinion of the

[1] 36 J. H. 120.

committee on elections, become highly necessary to have all doubts on the question before referred to removed, that the same understanding on the subject may be made to prevail in all the towns and in all the departments of the government of the commonwealth. Wherefore they respectfully report their opinion, of the expediency of this honorable house of representatives passing an order, by which the opinion of the justices of the supreme judicial court may be requested on the following question :—

Whether a town, having by the constitution a right to send a representative or representatives to the general court, can constitutionally and legally vote not to send a representative, and whether such vote would be binding on a minority of voters dissenting therefrom in such town."

The report was agreed to, and the order recommended by the committee adopted.

The committee subsequently recommended a reference of these cases to the next session, and they were referred accordingly.[1]

At the January session, a communication was received from the justices of the supreme judicial court, answering both questions in the affirmative.

The committee thereupon reported the facts in these two cases, as already above stated, and concluded : " That although some doubts may have heretofore existed, whether towns, constitutionally entitled to choose representatives, can legally waive the exercise of their right, yet by recurring to former decisions of this house, as well as the decision of the honorable justices of the supreme judicial court, on questions recently proposed to them, by this house, it is settled, that the right to send a representative is a corporate right, and that a town can constitutionally vote not to send a representative to the general court, if it choose to waive its privilege in that respect. And inasmuch as the qualified voters in said towns were, in the opinion of the committee, deprived of their constitutional rights, by reason of the motions made as aforesaid not being put to

[1] 36 J. H. 126.

them, at said meetings, for their determination, the committee ask leave to report, and do unanimously report, that the said Micajah Gardner, and Ziba Drake were not duly elected, and are not entitled to seats in this house. The report was agreed to.

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, ON THE QUESTION, WHETHER A TOWN, HAVING A RIGHT TO ELECT A REPRESENTATIVE, CAN CONSTITUTIONALLY VOTE NOT TO SEND.

The right of a town, to elect a representative, is a corporate right, secured by the constitution, to be exercised only in a corporate capacity; and if a town votes not to elect, or not to elect the whole number to which it is entitled, a minority of the electors, dissenting from such vote, cannot legally proceed to an election.

THE committee on elections, to whom were referred the petitions against the elections in Nantucket and Sharon, at the May session, having recommended the adoption of an order for obtaining the opinion of the justices of the supreme judicial court on the questions involved therein, it was accordingly

"Ordered, That the honorable the justices of the supreme judicial court be, and they hereby are requested to give their opinion on the following question:—

Whether a town, having by the constitution a right to send a representative or representatives to the general court, can constitutionally, and legally, vote not to send a representative, and whether such vote would be binding on a minority of voters dissenting therefrom in such town."

At the January session, the following communication from the justices of the supreme judicial court, in answer to the questions proposed to them, was received and referred to the committee on elections[1]:—

"To the speaker of the house of representatives of the general court of Massachusetts.

[1] 36 J. H. 217.

SIR,— The undersigned, justices of the supreme judicial court, have considered the several questions proposed to them, by an order of the house of representatives, passed 13th June, 1815, and request you to make known the following as their answer.

They are satisfied that the right to send a representative is a corporate right vested in the several towns by the constitution, and can be exercised by them only in a corporate capacity; and it necessarily follows, that when a town is legally assembled for the purpose of electing a representative, if a vote pass not to send one, the minority dissenting from that vote cannot legally proceed in the choice.

The undersigned have recurred to the opinion expressed by three of the justices of the court upon these points, in their answer to questions proposed to them by an order which passed the honorable house of representatives, on the 6th of February, 1811.

As that opinion was incidentally given in discussing another question, the undersigned have deliberately revised the subject; and the result is, that the survivor of the three justices who signed that answer remains of the same opinion therein expressed, and the rest of the undersigned justices fully concur in it.

By the constitution, chap. 1, sec. 3, art. 2, it is provided, "that every corporate town, containing one hundred and fifty ratable polls, may elect one representative; every corporate town, containing three hundred and seventy-five ratable polls, may elect two representatives," and so on, making two hundred and twenty-five ratable polls, the mean increasing number.

This article of the constitution, of itself, would seem to impose no duty upon towns, but only secure to them a right or privilege, which they might waive or improve, at their pleasure.

But by the third paragraph of the same article, it is provided, "that the house of representatives shall have the power, from time to time, to impose fines upon such towns as shall neglect to choose and return members to the same, agreeably

to the constitution." Taking both clauses together, it is obvious, that to send a representative is a corporate duty as well as a corporate right, for the neglect of which the house may impose a fine, but which neglect they are under no obligation by the constitution to punish. If the house may excuse the delinquency, we think it clear that a town may constitutionally vote not to send, and so incur the risk of a fine, or trust to the clemency of the house, and that in such case the minority cannot impose a burden upon the town, which the house of representatives may excuse them from bearing.

It appears to the undersigned, also, that the duty prescribed by the constitution extends to the whole number of representatives which any town may have a right to send; so that if the minority of a town having a right to send but one might proceed to choose when a vote has passed not to send any; the minority of a town which has the right to send many representatives might proceed to choose the whole number, although a vote had passed to send but a part of the number to which the town is entitled.

It is also worthy of consideration, that if a minority have the right under such circumstances, since no rule exists by which the number of electors is limited, a few individuals might act upon this important subject contrary to the sense of a vast majority; and the principle might be ludicrously carried into effect, by a number of votes much smaller than the number of representatives to be returned by the town.

For the foregoing reasons, and others which might be suggested, if necessary, the undersigned are fully satisfied with the opinion stated in the answer before referred to, to the order passed on the 6th of February, 1811.

With respect,

(Signed) ISAAC PARKER,
GEORGE THACHER,
CHARLES JACKSON,
SAMUEL PUTNAM,
SAMUEL S. WILDE.

WINSLOW.

An election, made after a vote not to send, does not become valid, by a reconsideration of that vote after such election.

The election of Charles Hayden, returned a member from the town of Winslow, was controverted by Francis Swan and others,[1] for the reasons stated in the report[2] of the committee on elections, made thereon and agreed to at the January session, as follows:—

"On the first day of May last, the qualified voters, in said town, were duly convened for the purpose of electing a representative; and on opening the meeting, it was voted 'not to send a representative to the general court in the year then ensuing,' upon which a number of voters withdrew from the meeting; nevertheless, the selectmen called for and received the ballots of several of the voters remaining, and declared Charles Hayden, Esq., elected, and then it was voted to reconsider the vote passed at the opening of the meeting, not to choose a representative. As it has been determined, that the right of sending a representative is a corporate right, and that a minority in town meeting, dissenting from the majority, cannot legally make choice of a representative, and that the reconsideration of the vote as aforesaid could not legalize the choice by a minority; the committee ask leave to report, and do unanimously report, that the supposed election of the said Charles Hayden is void, and that he is not entitled to a seat in this house."

DRESDEN.

The declaration of a voter, whose right to vote was in question, made after the election, and when he was not under oath, that he voted for a particular individual, was held not to be sufficient evidence for whom he voted, on an inquiry into the validity of the election.

The election of Isaac Lilly, returned a member from the town of Dresden, was controverted by Francis Rittal and

[1] 36 J. H. 57, 126. [2] Same, 303.

others,[1] for the reasons which are stated in the following report of the committee on elections, made at the January session[2]:—

"A meeting of the qualified voters in said town of Dresden was holden on the eighth day of May last, for the purpose of electing a representative for the year then ensuing, and one Reuben Meservy, who was at the meeting, and whose name was on the list of voters, being objected to, as not possessing property sufficient to entitle him to vote in the election, his name was thereupon crossed on the list, till the selectmen could ascertain his qualifications. On the ballots being called for, the said Meservy put in his ballot with the rest, which, on being sorted and counted, there were for George Houdlette, 65 votes, for Isaac Lilly, 64 votes, and George Goodwin, 1 vote. The selectmen declared there was no choice, and called again for the ballots, which resulted in the choice of the said Isaac Lilly. At the last balloting, the said Meservy did not vote. From the evidence produced, it did not appear to the committee, but that the said Meservy was a legal voter, neither did it appear for whom he voted, except by his own declaration, made after the meeting, and when he was not under oath, that he voted for Isaac Lilly. Upon the foregoing facts, the committee ask leave to report, and do unanimously report, that the said Isaac Lilly was duly elected, and is entitled to a seat in this house."

This report was agreed to.

[1] 36 J. H. 14. [2] Same, 329.

1816—1817.

COMMITTEE ON ELECTIONS.

Messrs. *Benjamin Gorham*, of Boston, *Samuel P. P. Fay*, of Cambridge, *Jairus Ware*, of Wrentham, *Frederick Howes*, of Danvers, *Edward D. Bangs*, of Worcester.

FALMOUTH.

Where a member had been convicted upon an indictment for larceny, and the verdict had been set aside, a new trial granted, and the indictment afterwards quashed for informality:—the conviction was held not to disqualify him.

James Morrell being returned a member from the town of Falmouth, in the county of Cumberland, and having taken his seat in the house, his right to hold the same was controverted by Moses Morrell and others, on the ground, that he had been convicted of larceny.[1]

The committee on elections made the following report in this case, which was agreed to,[2] namely:—

The committee on elections, to whom was referred the petition of Moses Morrell and others, praying the attention of the house of representatives to the case of James Morrell, Esq., one of its members, beg leave to report, that,

The only charge preferred against the said James Morrell, which the committee thought required investigation, was that of larceny, of which, the petitioners state, that the said James had been convicted. The evidence on this charge resulted principally from the transcript of the record of the circuit court of common pleas for the county of Cumberland, from which it appears, that the said James Morrell was indicted at said court in March, 1814, for stealing a town order from one Jabez Jones,

[1] 37 J. H. 7. [2] Same, 101.

on which was due the sum of $15.12; that he was there tried and found guilty by the jury, but the verdict was set aside for irregular conduct in the jury after they had withdrawn from court and before they had returned their verdict; a new trial was of course granted to said Morrell, and the cause was continued to the next term of said court, when the indictment was quashed for want of due form.[1] These facts could not substantiate the charge of larceny against the said James, since the verdict had become a nullity and upon a new trial he might be acquitted; but to obviate the inferences unfavorable to the character of said James, which might be drawn from the facts as they appear of record only, the committee think it proper to state, that from further inquiry on this subject, it appeared, that the only material witness on the trial was the said Jones, from whom the said Morrell had got possession of the town order at a meeting with him for the purpose of adjusting some demands which the said Morrell had against him; and about which there was some disagreement at the time of the meeting; what testimony the said Jones gave at the trial before the jury, does not appear; but after the indictment was quashed, the said James Morrell was brought before Woodbury Storer, Esq., of Portland, upon a complaint for the same offence, and the said Jones there appeared to substantiate the charge; but the magistrate, upon a full understanding of the facts, was satisfied that they did not support the complaint, and dismissed the said Morrell. Soon afterwards a complaint was preferred to the grand jury against the said Morrell, and the said Jones appeared before them and was examined, but the jury did not find a bill. One of the grand jury, who was also present at the examination before Woodbury Storer, Esq., appeared before the committee, and from his statement of the evidence given by said Jones in his hearing, the committee are all impressed with the belief, that the conviction abovementioned must have taken place through some mistake or misrepresentation, and that no imputation

[1] The words, "a true bill," were wanting over the signature of the foreman of the grand jury.

can justly rest upon the said Morrell, of the offence charged against him by the petitioners.

The committee therefore report, that it is inexpedient for the house of representatives to take any further order on the subject of said petition."[1]

ANDOVER.

The selectmen having inadvertantly omitted to count a considerable portion of the votes given in at an election, in consequence of which it became impossible to ascertain whether or not the members returned received a majority of all the votes, the election was held void.

The election of Thomas Kittredge, John Kneeland, and Stephen Barker, members returned from the town of Andover, was controverted by Isaac Osgood and others, on the ground, that the selectmen, who presided at the meeting, when the supposed election took place, neglected to count a large number of the votes given in, and consequently that it was uncertain whether any of the members returned had a majority of the votes.[2]

The petition was accompanied by the following statement of facts, signed by the selectmen:—

"That they endeavored, with due care and caution, to receive, sort, and count the votes, given in at the said election, and to check the list of voters, as they were given in; that the votes were received in several small boxes, heretofore used for that purpose; that the whole number of votes counted was four hundred and thirty-six; of which the Hon. Thomas Kittredge had two hundred and thirty-seven, John Kneeland, Esq., two hundred and thirty-eight, and Stephen Barker, Esq.,

[1] The rule in England, with relation to disqualification by reason of crime, is thus stated:—

"A person attainted of treason or felony, being dead in law, is disqualified; but an indictment for felony causes no disqualification until conviction; and even after conviction, a new writ will not be issued, where a writ of error is pending, until the judgment has been affirmed." May, L. and P. of Parliament, (2d Ed.) 35.

[2] 37 J. H. 7.

two hundred and thirty-five; that on the day after the meeting was held, one of the selectmen discovered, on comparing the names checked on the list with the number of votes declared to be given in, that there were about one hundred and fifteen more names checked than there were votes counted. They have no doubt, that one box, containing about one hundred and fifteen votes, was accidentally omitted to be sorted and counted; but not discovering the error till the day after the meeting, and the ballots having been scattered, and in part removed by young persons, who had access to the boxes, after the meeting, no proof of that fact now exists, but from the checked list. In sorting and counting the votes, each of the three boxes contained a majority for the three gentlemen declared chosen; and it is our opinion, that if the remainder of the votes, supposed to be given in, had been counted, the majority would still have been as great for the three gentlemen declared chosen."

This case was referred from the May to the November session,[1] at which, the committee on elections reported thereon[2] as follows:—

"At the meeting for the choice of representatives from Andover, in May last, it was voted to send three representatives to the general court; and at the close of the poll, for the choice of them, the selectmen declared the whole number of votes given in, to be four hundred and thirty-six; that the Hon. Thomas Kittredge, having two hundred and thirty-seven, John Kneeland, two hundred and thirty-eight, and Stephen Barker, Esq., two hundred and thirty-four, were duly elected, and made their return accordingly; but it appeared in evidence to the committee, from the presiding officer of said meeting, that the whole number of legal votes given was at least five hundred and fifty-one, and that the selectmen, (wholly from inadvertence as the committee believe,) omitted altogether to count one hundred and fifteen of that number; and that it cannot be ascertained for whom the votes thus omitted to be counted were given; as no evidence therefore exists that either of the

[1] 37 J. H. 172. [2] Same, 307.

members, sitting in this house, by virtue of the return of the selectmen, had a majority of all the votes actually given in at that election; the committee beg leave to report, and do report, that the said Thomas Kittredge, John Kneeland, and Stephen Barker, were not duly elected, and therefore are not entitled to their seats in this house."

The report was agreed to by a vote of 88 to 80.[1]

GLOUCESTER.

Reasonable notice, either expressed, or implied from previous usage, must be given of the time, when the poll, for choice of representative, will be closed.

Where the usage had been to close the poll at four o'clock P. M. on the day of election, and the selectmen gave notice, after counting the votes cast, at about twelve o'clock, that the poll would close at half past twelve; and, after refusing to put a motion, duly seconded, to keep it open until four o'clock, did in fact close it at a quarter past one; and it appeared that this was done in accordance with the previous determination of the selectmen, expressed before the meeting, to members of the political party to which they as well as the member returned belonged, and to no others; it was held that the election was void.

The election of William W. Parrott, returned a member from the town of Glocuester, was controverted by John Tucker and others, on the ground of improper conduct, on the part of the selectmen, who presided at the meeting, at which said Parrott was chosen, in prematurely closing the poll without due notice.[2]

The facts in the case are set forth in the following report[3] of the committee on elections, which was made thereon at the November session:—

"A meeting of the inhabitants of Gloucester was legally holden, for the choice of representatives, at the meeting-house of the harbor parish, so called, on the sixth day of May last, and was opened agreeably to the warrant, at nine of the clock in the forenoon. As soon as the meeting was opened, a motion was regularly made, put, and carried, that the town should send but one representative to the general court. The

[1] 34 J. H. 316. [2] Same, 7, 172. [3] Same, 307.

poll was then opened, and the balloting begun. In the course of the forenoon, between the hours of 10 and 12 o'clock, Mr. John Tucker, Mr. James Odell, Mr. Nash, Mr. Smith, and many others, severally, and at different times, made inquiry of the selectmen, when the poll was to close, to which the selectmen answered always, 'there is no time set,' 'we have not yet determined,' 'there is time enough yet,' or by some expression to that effect; nor did they give the least intimation, when answering these inquiries, that the poll would close at an earlier hour than usual, which was 4 o'clock P. M. At about 12 o'clock, Capt. Israel Trask, one of the selectmen, and Mr. John Rogers, the town clerk, began to count the votes, which had then been given in, the counting of which occupied about twenty-five minutes. There is, however, some contradiction of testimony as to the time when the counting commenced, two of the selectmen testifying that it began at about half past 11 o'clock, and was finished at about 12, while a great many witnesses, equally respectable and less interested, testified that it began about 12, and closed about twenty-five minutes past 12; and this the committee believe to have been the fact. As soon as these votes were counted, the town clerk handed a paper to Mr. William Pierce, one of the selectmen, on which was set down the result, namely:—'264 for W. W. Parrott, 205 for Benj. K. Hough.' This was immediately communicated to Capt. Samuel Calder, chairman of the selectmen, who thereupon instantly declared, that the poll would close at half-past 12 o'clock. This was the first public notice of the time when the poll would close, and to a great proportion of the people, the first intimation or knowledge, that it would close at an earlier hour than usual. This declaration was heard with surprise, and excited much indignation, and being reported out of the house, a great many people returned with a view to induce the selectmen to extend the time; it was stated to them that this was a surprise upon the voters, who had calculated upon the usual time of closing the poll, as no notice had been given to the contrary, and that many were on their way from Sandy Bay, and other distant parts of

the town, who could not possibly arrive before the close of the poll, unless the time was enlarged, and Major Norwood informed the selectmen, that he had passed thirteen or fourteen persons on foot at a distance, coming to vote, who could not otherwise get up in season to vote. Mr. Nash made a motion which was seconded, that it was inexpedient to close the poll till 4 o'clock, and requested the selectmen to put the motion, which they refused to do. Great heat and agitation continued, until the poll finally closed at about a quarter past 1 o'clock; but no violence was attempted or threatened, nor was the balloting interrupted. The final result of the balloting was 289 for the sitting member, 261 for Benjamin K. Hough, and one for a Mr. Huston, in the whole 551 votes, giving to Mr. Parrott, an excess of 27 over all the other votes. From this it appears also that eighty-two votes were given in, from the time the counting first began, about 12, till the poll was closed at a quarter past one. It appeared in evidence, that many persons lost their votes from want of notice, and the committee believe that more than twenty-seven additional votes would have been cast, had seasonable notice been given. The selectmen, upon being questioned by the committee, why they had not given earlier notice of the time of closing the poll, in answer, alleged that they were influenced to withhold the notice or declaration, because at the April meeting preceding, they had experienced much difficulty, and some disturbance had arisen, when the time arrived, by many insisting that the poll should not then be closed, and that votes should be received after the time fixed; but as it cannot be supposed, nor was it pretended by the selectmen, but that some notice should be given, previous to closing the poll, the committee could not perceive, how this could have been their motive for the delay; as it must have been obvious to them, that to withhold such notice, when they had determined to anticipate the usual time by three hours, was in fact to furnish a cause, and even an apology for disturbance and clamor; much less do the committee perceive, how the selectmen could have been influenced by that

reason, to withhold all public notice whatever, that the poll would close in the forepart of the day.

The committee also further report, that the town of Gloucester contains six parishes, and between 900 and 1000 qualified voters for representatives; that the harbor parish, in which the meeting was held, contains about one half the population of the town; that three or four of the parishes are from four to six miles distant from the place of meeting; that for ten years previous to the present election, the time for closing the poll, in the choice of representatives, had been announced, either by N. B. upon the warrant, or by posting up a notification on the morning of the election day, in some conspicuous situation at the place of meeting; that, for the eight preceding years, the meetings had opened at 10 o'clock, and the poll had always been kept open till 4 o'clock, P. M.; that no one of the present board of selectmen had been for some yeafs previous a selectman of said town, but they were well acquainted with the relative local situation of the different parts, and well knew the times usually allowed for voting at former meetings; that, for some days before this election, they had come to the determination to open the meeting at 9 o'clock, and close the poll in the forenoon, or before the usual hour of dinner; and it was stated, that they had made some arrangements in their lists of voters, (though what they were, did not very clearly appear,) which would much facilitate the business of the day. It appeared further in evidence to the committee, that all the individuals, composing the board of selectmen, were friendly to the choice of Mr. William W. Parrott, the sitting member, and politically hostile to the success of Mr. Benjamin K. Hough, the opposing candidate, and that it was generally understood, that the election then approaching would be warmly contested.

The committee further report, that six days previous to the day of election, and after the selectmen had come to the determination to open the meeting at 9 o'clock, and to close the poll in the forepart of the day, Capt. Samuel Calder, chairman of the selectmen, signed sundry circular letters as 'chairman

of the committee of elections,' which were sent into different parts of the town, and directed to persons who were supposed to be friendly to the election of Mr. Parrott, and who might have an influence in getting his friends to the polls, setting forth the propriety of choosing but one representative, recommending Mr. Parrott as worthy of their confidence and their suffrages, and urging upon them the necessity that every 'republican' should attend as soon as the meeting was opened, alleging as a reason, that the first business would be to decide on the number of representatives the town should elect. It also appeared in evidence to the committee, that at a caucus or meeting of the friends of Mr. Parrott, assembled to devise measures to promote his success, Mr. Peirce, one of the selectmen, made known the intention of the selectmen to close the poll in the forepart of the day, and indeed it seemed to be admitted before the committee, that it was well understood by many, if not most of the active and zealous friends and supporters of Mr. Parrott, that the poll would close at least as early as one o'clock; and on the part of the sitting member, it was contended that this was no secret to any one, and that the knowledge of this, as well as of the circular letter, was equally general among his opponents or the political friends of Mr. Hough; but there was no evidence whatever to satisfy the committee, in any degree, that any one of the political opponents of Mr. Parrott had ever read the letter before the election; the most that appeared being, that one of them heard it or part of it read; nor that any one of them had any knowledge whatever, that the poll would close at an earlier hour than usual, until the determination to close it was announced at the meeting, in the manner above stated; and the committee believe, that it was the intention of the selectmen not to communicate their determination to close the poll in the forenoon, to the friends of Mr. Hough, or to the public generally, but in the manner above stated.

In the opinion of the committee, there can be no doubt, that, at all elections, the voters are entitled to reasonable notice of the time when the poll is to close, which notice may be either

actual, by publishing the same in season, or implied, where there is no essential departure from established usage; and taking into consideration the remote situation of many parts of the town of Gloucester from the place of meeting; the practice for many years before, to keep the polls open till 4 o'clock, P. M., at the same time, that public notice was always given, at least as early as the opening of the meeting, when the poll would close; the determination of the selectmen, at this election, to anticipate the usual time, by at least three hours; and that the only public notice they gave was less than one hour before the poll was finally closed; the committee are of opinion, that reasonable notice was not given in this instance, and that, from the circumstances of the town and the situation of the voters, it is wholly uncertain what otherwise would have been the result of the election. And the committee think proper further to state, that, from all the evidence adduced before them, they are compelled to believe, that the selectmen did refuse to give public notice at the meeting, as before stated, when the poll would close, and did communicate their intention to close it earlier than usual, to the friends of Mr. Parrott, and withhold that communication from the friends of Mr. Hough, his opponent, and from the public generally, with the view, and for the purposes, of obtaining, in that election, the unfair, and of course, illegal advantages, which must result from the knowledge of this circumstance on one side, and the ignorance of it on the other.

The committee therefore beg leave to report, and do report, that the election of William W. Parrott, as representative from the town of Gloucester, is wholly void, and that his seat in this house ought to be vacated."

The report was agreed to by a vote 132 to 37.[1]

[1] 37 J. H. 131.

MALDEN.

[The election of Ebenezer Nicholls, and Nathan Nicholls, members returned from the town of Malden, was controverted by Henry Gardner, 2d, and others, for various reasons stated in their petition[1]: but as no evidence was adduced in support thereof, and as the members returned did not take their seats, at the May session, the committee on elections reported a reference[2] of the subject to the "next general court:" which was agreed to, and it does not appear to have been again called up.]

[1] 37 J. H. 23. [2] Same, 172.

1817—1818.

COMMITTEE ON ELECTIONS.

Messrs. *Benjamin Gorham*, of Boston, *Samuel P. P. Fay*, of Cambridge, *Edward D. Bangs*, of Worcester, *Frederick Howes*, of Danvers, *David Townsend*, of Waltham.

MALDEN.

Where a list of voters for governor, lieutenant governor, and senators, was seasonably made out and published by the selectmen, and was duly corrected and revised by them with reference to and as a list for the election of representatives, but was not again published, though carried by them to the meeting; it was held, that this omission to publish was not sufficient of itself to invalidate the election.

The election of Nathaniel Nicholls, and Ebenezer Nicholls, members returned from the town of Malden, was controverted by Bernard Green and others, on the ground, (among others,)

that there was no list of voters made out and published according to law, previous to the meeting at which the members returned were chosen.[1]

The committee on elections, at the May session, made the following report in this case:—

"The only allegation in the petition, which was supported by evidence sufficient to claim the attention of the committee, was, that there was no list of persons, qualified to vote for representatives in the general court, made out and published according to law, previous to the meeting holden for the choice of representatives.

It appears that the assessors, previous to the first day of March last, made out a list of persons in said town, qualified to vote for governor, lieutenant governor, and senators, which list was seasonably corrected and published by the selectmen; and after the April election, namely, on the twenty-first of April, this list was taken down by the selectmen, and duly corrected, with reference to, and as a list for, the representative election in May following; but the list was not again published, but continued in the hands of the selectmen, and was carried by them to the meeting.

The committee are of opinion, that making out and publishing a list, designating the persons qualified to vote for representatives, is required by the statute, and that such a list was not in this case made out and published according to law. But (whatever penalties the assessors or selectmen may have incurred) the committee are of opinion, that it was not the intention of the legislature, in the laws enacted on this subject, to make the election void merely by the omission to make and publish the list. The omission may, doubtless, in many cases, furnish such evidence of fraud, or create such uncertainty in the result of an election, as to justify a house of representatives in declaring the same void; but in the case before the committee, it did not appear that any thing was omitted by the assessors or selectmen of Malden, with fraudulent views, or that any uncertainty as to the choice was occasioned

[1] 38 J. H. 13.

by the omission. The votes for the sitting members were double those for all the opposing candidates; and there was no evidence before the committee, that any person voted who had not a right to vote, or that any qualified voter was deprived of the oppportunity of exercising his privilege.

The committee, therefore, are unanimously of opinion, and do report, that the said Nathaniel Nicholls, and Ebenezer Nicholls, were duly elected representatives to the general court, and are entitled to hold their seats." The report was agreed to.[1]

SOUTHBRIDGE.

A town having voted, at a legal meeting for the choice of representative, not to elect, and dissolved the meeting, a second meeting was called for the same purpose, at which a motion not to send was made and seconded, and declared, upon a division of the meeting, to be decided in the affirmative. A motion was then made and seconded to dissolve the meeting; immediately after which, the vote not to send was disputed. The selectmen refused to put the motion to dissolve the meeting; but a motion to send a representative being then made, seconded and carried, an election was thereupon effected. It was held, that such election was void.

Where a member elect, being present at the meeting, declines to serve, and notifies the meeting thereof, the town may, it seems, proceed to a new election.

The election of James Wolcott, Jr., returned a member from the town of Southbridge, was controverted by Edward Morris and others, on the ground of improper conduct on the part of the selectmen, who presided at the meeting, when the supposed election took place, in refusing to put a motion duly made and seconded to dissolve the meeting, after passing a vote not to send a representative.[2]

The committee on elections reported on this case, at the May session, as follows:—

"A legal town meeting was holden at Southbridge, on the first Monday of May last, at which it was duly voted not to send a representative to the general court, the present year, and the meeting was dissolved; another town-meeting for the

[1] 38 J. H. 101. [2] Same, 43.

choice of representatives was holden on the thirteenth day of May last, and it was regularly moved and seconded, that the town should not send a representative the present year. The motion was put, and it being doubtful how the vote stood on the first trial, the house was polled, or divided, and was then counted by the presiding officer, and the numbers declared to be thirty-four for choosing, and thirty-seven against choosing a representative. A motion was then made and seconded to dissolve the meeting; immediately after which, the vote for not sending a representative was disputed. The presiding officer did not put the motion which was made to dissolve the meeting, though frequently urged to do so. Considerable disorder and disturbance prevailed. After some delay, a great proportion of those who had voted against, as well as some, who had voted in favor of, sending a representative, finding the presiding officer not disposed to put the motion for dissolving the meeting, left the house. After which there was a motion put and carried, to send a representative, the motion to dissolve the meeting not having been disposed of. The votes for representative were then called for, and given in, and Mr. Samuel Fiske, having all the votes, amounting to twenty-seven, was declared chosen, but declined serving; a new vote was then called for, and Mr. James Wolcott, Jr., the sitting member, having twenty votes, being all that were given in, was declared chosen.

The committee have called on the respondent, for any evidence, to show that there was any uncertainty as to the first vote for not sending a representative, after dividing the house, but none has been furnished to the committee, although sufficient time has been allowed for that purpose, if any such evidence existed. The committee have no doubt, that the result of the voting was such as was declared by the presiding officer, and was the fair expression of the minds of the majority of the voters, who attended the meeting. It did not appear that there was any haste in putting the vote, or any surprise upon any one; but on the contrary, the vote was not taken, until the expiration of two hours from the time appointed for the

meeting; nor did there appear any reasonable cause to question the vote, as declared after the second trial; or to delay or refuse to put the motion for a dissolution of the meeting. The committee, therefore, finding that it had been regularly and fairly voted not to send a representative, and that a motion to dissolve the meeting was duly made and seconded, and ought to have been put to vote, and was not, are of opinion, that the subsequent proceedings of the meeting were illegal and void, and therefore beg leave to report, and do report, that the said James Wolcott, Jr., was not duly elected a representative, and is not entitled to hold his seat."

The report was agreed to.[1]

CASE OF ASAHEL STEARNS, MEMBER FROM CHARLESTOWN.

The office of University Professor of Law, in Harvard University, is incompatible with that of representative.

At the commencement of the January session, a letter was received from Asahel Stearns, member from the town of Charlestown, announcing, that, since the last session, he had accepted the office of "University Professor of Law," in Harvard College, and submitting for the determination of the house, whether that office is incompatible with his holding his seat as a member.

Messrs. *Bartlett*, of Charlestown, *Thacher*, of Boston, and *Lincoln, Jr.*, of Worcester, were appointed a committee to consider the subject.[2]

The committee subsequently made the following report[3]:—

"The committee, to whom was referred a letter to the Hon. Timothy Bigelow, speaker of the house of representatives, from Asahel Stearns, Esq., one of the representatives of the town of Charlestown, informing him, that, since the last session of the legislature, he had accepted the office of 'University Professor of Law,' in Harvard College, and submitting

[1] 36 J. H. 141. [2] Same, 171. [3] Same, 262.

the question, whether the office was incompatible with a seat in the house of representatives, having attended to the subject, ask leave respectfully to report, that, by the statutes regulating the law school in Harvard College, which was founded in the year one thousand eight hundred and seventeen, the professor is elected by the corporation of the college, and is required to reside in the town of Cambridge, and to open and keep a school there, for the instruction of the graduates of that university, and of others prosecuting the study of the law. He is also required, in addition to prescribing to his pupils a course of study, to examine and confer with them upon the subjects of their studies, to read to them a course of lectures, and generally to act the part of a tutor to them, so as to improve their minds, and assist their acquisitions.

The students of the law school have access to the college library, and the privilege of attending the lectures of the university. They are permitted to board in commons, and are required to give bond to the college, for the payment of college dues, and the fee for tuition allowed to the professor. They are on the same footing generally, in respect to privileges, duties, and observance of all college regulations, as by the laws pertain to resident graduates. A degree of bachelor of laws has been instituted by the college, to distinguish those pupils, who, having remained at least eighteen months at the school, shall pass the residue of their noviciate in the office of some counsellor of the supreme judicial court, and thereby become entitled to practise law in the courts of the commonwealth.

By the constitution of this commonwealth, ch. vi. sec. ii., it is declared, that 'no person holding the office of president, professor, or instructor of Harvard College, shall have a seat in the senate, or house of representatives; but their being chosen or appointed to and accepting the same, shall operate as a resignation of their seat in the senate or house of representatives, and the place so vacated shall be filled up.' The university is not, in its corporate capacity, entitled to elect a representative to either branch of the legislature. The rights and privileges,

however, of that ancient seminary, have ever been fostered by the government, and are dear to all lovers of religion, science, and literature. At the adoption of the constitution, all the professors and instructors of Harvard College were required to reside in Cambridge, were employed in the immediate government and instruction of the students, and could not, consistently with the performance of their official duties, attend to the business of legislation. But the framers of that instrument did not see fit to provide an exception in favor of professors, who might afterwards be elected, who might not be required to reside constantly at the college, and whose duties might not be incompatible with a seat in the legislature. The terms of the constitution on this subject are peremptory, containing no qualification nor limitation; and they operate, in the opinion of your committee, to exclude from holding a seat in either branch of the legislature, the professors and instructors of Harvard College, known and existing at the adoption of the constitution, and all others who might be elected to professorships, which might be established in subsequent periods of the commonwealth.

In conference with Mr. Stearns, he informed the committee, 'that the professor of law receives no salary or other emolument from the funds of the college; that he has no vote with the president, the other professors and instructors, in the government of the college, or management of its concerns; that he has no concern with or control over any of the undergraduates, or graduates, not members of the law school; that he is not required to devote his attention exclusively to the school, but, on the contrary, that he is obliged to keep an office, and to continue to be a practising counsellor of the supreme judicial court; that he is not, by law, exempt from taxation, as the president, the professors, and instructors of the college, as established at the formation of the constitution, are, and always have been.' Mr. Stearns also expressed his doubts to the committee, 'whether, in strict propriety, the law school could be considered as a part of the college, within the meaning of the constitution; and suggested, whether it ought not

rather to be regarded as an institution connected with the college, and, with that and the medical school, constituting the university.'

Although the professor does not receive a stated salary from the college, yet the compensation, to which he is entitled for his services, is collected under the authority of the college, and by force of the bond which is required from each student on his admission to the school. It is true, that the professor must keep an office, and continue to be a practising counsellor of the supreme judicial court. But these are part of his qualifications for the professorship, and if these should cease, the corporation of the college would have a right to declare the chair vacant, and to elect another to the place. The president and certain of the professors and tutors of the college are, by law, specially exempted from the payment of taxes; but this is at the will of the legislature, and is not a constitutional right. The committee do not conceive that they are warranted, either by the constitution or the laws of the commonwealth, to make a distinction between the college and the university. The name by which this institution is recognized in the constitution and ancient laws of this commonwealth, is 'Harvard College;' but in the chapter of the constitution which declares and ratifies the rights and immunities of that college, it is called the 'University at Cambridge.' Known by both names, prior to the establishment both of the medical and law schools, the doubts suggested by Mr. Stearns on this point are not, in the opinion of the committee, well founded.

The law school in Harvard University, being thus established by and under the patronage of that institution; its professor being elected by and deriving his authority and duties from the same source; and the students being recognized as members thereof; the committee are of opinion, and do report, that, by the acceptance of the office of university professor of law, the seat of Asahel Stearns, Esq., in the house of representatives, became vacated; and that notice thereof be sent to the town of Charlestown, to fill up the vacancy, if the inhabitants thereof see fit so to do."

The report was discussed and recommitted,[1] but finally agreed to,[2] by a vote of 71 to 12.

[1] 38 J. H. 293. [2] Same, 419.

1818—1819.

COMMITTEE ON ELECTIONS.

Messrs. *John Prince, Jun.*, of Salem, *Jairus Ware*, of Wrentham, *Isaac Adams*, of Portland, *Thomas Kittredge*, of Andover, *Luther Lawrence*, of Groton.

BOSTON.

It is the duty of selectmen, presiding at a meeting for the choice of representatives, to give a reasonable time, before proceeding to the election, for the town to exercise its corporate right, to determine whether any and how many members shall be chosen; and if they do not allow such reasonable time, but proceed with the election, notwithstanding a motion made and seconded, as to the number to be chosen, the election is void.

The election of Stephen Codman, Benjamin Russell, Benjamin Whitman, Charles Davis, William H. Sumner, Nathaniel Curtis, John Howe, Jonathan Loring, Benjamin Gorham, Benjamin Smith, John Cotton, Benjamin Rand, David Sears, Francis Bassett, and Enoch Silsby, members returned from the town of Boston, was controverted by John D. Howard, Jun., and others, on the ground of improper conduct on the part of the selectmen, who presided in the meeting, at which the members returned were elected.[1]

The committee on elections, at the January session, made the following report in this case[2]:—

[1] 39 J. H. 157. [2] Same, 190.

"A meeting of the inhabitants of the town of Boston, qualified to vote for representatives to the general court, was holden on the fourteenth day of May last past, for the purpose of electing one or more persons to represent that town in the general court, appointed to be convened and holden at Boston, on the last Wednesday of the same month of May.

The allegation in the petition is, 'that at the town-meeting of the inhabitants of the town of Boston, on Thursday, the fourteenth day of May, 1818, for the choice of representatives, a motion was then made and seconded, to choose seven representatives, instead of fifteen; the motion, though urged by the citizens present, to be put, was utterly refused to be put by the selectmen, according to law; and the number of fifteen was chosen, although there was no vote taken to choose any.'

The complaint of the petitioners is founded on an opinion of the judges of the supreme judicial court, and on several decisions of this house, 'that it is a corporate right to fix the number of representatives to be chosen, previous to making the choice.'

The committee find, that after said meeting had been opened in the usual manner, the town clerk informed the meeting, that there had not been any list of the ratable polls, in town, returned this year; but that, by the last year's return, the town was entitled to send forty-two; that their number was as great this year as the last; and they had a right to choose as many as they did the last year; and thereupon, he directed the voters to bring in their votes for one or more persons.

At this time, there were between sixty and one hundred voters in the meeting.

The evidence in support of the foregoing allegation was derived from eight witnesses, who all testified, that they were present at said meeting, when it was opened; that instantly after the direction of the town clerk to bring in votes, Mr. John D. Howard, Jun., made a motion, that only seven representatives should be chosen, which motion was seconded by Mr. Ebenezer Clough. They further testified, that they saw no votes given in, before said motion was made and seconded.

Some of the witnesses were near, and others remote from, the selectmen's box.

The selectmen refused to put the motion, one of them saying, that it had not been usual to take a question of that kind.

Two of the witnesses were Mr. Howard, who made the motion, and Mr. Clough, who seconded it.

Mr. Howard testified, that he went to the meeting with an intention to make the motion; and that, while the town clerk was reading the warrant, he communicated his intention to Mr. Clough, who agreed to second the motion. Mr. Howard also testified, that he made the motion, as soon as he could speak, after the town clerk had directed the voters to bring in their votes; and that he was standing, at the time, on the floor of the house, about ten feet from the selectmen's box, at the south-west corner thereof.

The evidence against the allegation in the petition was derived from nine witnesses, four of whom were selectmen, the town clerk, one of the constables, and three of the voters. The four selectmen, the town clerk, and the constable, all testified, that they heard the motion made and seconded; two of the selectmen thought the motion was made by Mr. Clough; the other two selectmen and the constable testified, that the motion was made by Mr. Howard. One of the selectmen testified, that he was positive that there were votes in his ballot box at the time the motion was made; he thinks there were from fifteen to twenty. One other of the selectmen testified, that he heard the motion made and seconded, and that he immediately stated, that it was not customary to take a question of that kind in the meeting; that when he heard the motion seconded, he turned and saw votes in Mr. Lovering's box; he thought there were from five to ten votes in the box; he did not recollect seeing more than one box extended at the time to receive votes; he thinks there was sufficient time, after the town clerk called for votes, for fifty persons to have voted, and to have gone out to the stairs.

One other of the selectmen testified, that instantly after the direction aforesaid was given by the town clerk, the four junior

selectmen extended their boxes to receive votes, they having their boxes in their hands while the town clerk was speaking; and that no votes were received, except in one box, before he heard the motion. He also testified, that in his opinion, the motion could not have been made, with propriety, sooner than it was after the meeting was opened. Two of the selectmen testified, that the reason for not putting the motion was, because there were votes given in before the motion was made, and this reason for their refusal to put it was then stated to the meeting. Two of the selectmen, and the town clerk, and the constable, were of opinion, that it was from two to three minutes, after the town clerk had called for the votes, before the motion was made.

The three other witnesses testified, that they were in the hall, at some distance from the selectmen's box, at the time the town clerk gave the direction to bring in votes for one or more; that they approached to the north corner of the selectmen's box, and put their votes into Mr. Lovering's box, and retired from the hall; but did not hear the motion. One of them stated, that if the motion had been made in half a minute after he voted, he could not have heard it, as he was out of the hall. Another stated, that he did not hear it, although he staid in the hall a minute after he had voted.

It was satisfactorily proved to the committee, that there were no votes in any of the ballot boxes, excepting the one held by Mr. Lovering, until after the selectmen had decided and stated that the motion aforesaid could not be put; and that the course pursued by the selectmen, in receiving votes at this meeting, was the same as has been practised for many years past, and that it had been usual in said town, at such meetings, to have a motion made to fix the number of representatives, previous to making the choice. The committee were also satisfied, from the evidence, that instantly after the direction aforesaid of the town clerk, there was some noise occasioned by the voters pressing to put in their votes. It further appeared, that when the motion was decided not to be put, there were no persons present at the meeting, for the

purpose of checking the list of voters, as the votes were put in. It also appeared, that the meeting was orderly, and that the whole number of votes given in for representatives was seven hundred and ninety-six, and that the sitting members had each six hundred and twelve votes.

The question to be decided on the foregoing facts is, whether it was the duty of the selectmen to submit the motion to send seven representatives, made as aforesaid, to the meeting? If it was their duty to have done so, the election was void.

It is difficult, from the conflicting evidence in this case, to determine the precise time when the motion was made, in reference to the commencement of the voting. It is apparent, however, to the committee, that the direction of the town clerk to the voters, to bring in their votes, the presentation of the ballot boxes by the selectmen, to receive the votes, and the commencement of the voting, followed in such rapid succession as to be nearly simultaneous, so that no time intervened, in which the motion could have been made and seconded, previous to the commencement of the balloting.

As the right of determining the number of representatives is a corporate right, to be exercised previous to making the choice, it was the duty of the selectmen to have given a reasonable time for the exercise of that right. The selectmen having, in this case, adopted the usage of the town, for many years, as their guide, instead of the decisions of the house, in regulating the meeting, did not give a reasonable time for the motion to be made and decided, previous to the commencement of the balloting.

It is, therefore, the opinion of the committee, that the motion was made in a reasonable time, and that it was the duty of the selectmen to have put the motion, so that the meeting might have determined the number to be chosen, before the choice should be made.

The committee, therefore, report, that the supposed election of representatives, for the town of Boston, is illegal and void; and that the said Stephen Codman, Benjamin Russell, Benjamin Whitman, Charles Davis, William H. Sumner, Nath-

aniel Curtis, John Howe, Jonathan Loring, Benjamin Gorham, Benjamin Smith, John Cotton, Benjamin Rand, David Sears, Francis Bassett, and Enoch Silsby, are not entitled to seats in this house."

The report was considered, and debated at length, and agreed to on the twenty-eighth of January, by a vote of 101 yeas to 22 nays.[1]

It was then ordered, that the committee on the pay roll be directed to make up the pay of the members from Boston, to the day of the adoption of the report.[2]

1819—1820.

COMMITTEE ON ELECTIONS.

Messrs. *Charles Davis*, of Boston, *Jairus Ware*, of Wrentham, *Daniel Noble*, of Williamstown, *Ebenezer Mosely*, of Newburyport, *Erastus Foote*, of Wiscasset.

CHARLESTOWN.

It is the duty of selectmen, before proceeding to an election, to allow reasonable debate upon, and a fair discussion of, the question, to what extent the town will be represented, provided such debate and discussion are offered;—otherwise the election will be void.

A decision of the presiding selectman, not dissented from by his brethren, at a meeting held for the choice of representatives, is the decision of the whole board.

The election of Timothy Thompson, Jun., Philemon R. Russell, Peter Tufts, Thomas Harris, John H. Brown, and Richard Devens, members returned from the town of Charlestown, was controverted by Benjamin Swift and three hundred

[1] 39 J. H. 239, 247, 251. [2] Same.

and fifty-five others, inhabitants of that town,[1] for reasons which are fully stated in the following report of the committee on elections[2]:—

"After an examination of many witnesses, adduced by the petitioners, and by the sitting members, and other evidence in the case, the committee find the following facts: that a meeting of the town of Charlestown was duly and legally warned, to be holden on the third day of May now last past, for the purpose of choosing one or more representatives to the present general court; that when the legal voters of the town, in the choice of representatives, were assembled for the purpose, the meeting was duly opened by reading the warrant for the same, and the chairman of the board of selectmen, Timothy Thompson, Jun., Esq., stated, officially, that the town was constitutionally entitled to send six representatives, and the number it would send would be the first question for consideration; that, immediately, a motion was regularly made and seconded, that the town should send two representatives, and immediately after, another motion was regularly made and seconded, that the town should send six representatives. The chairman then said, that it was his duty to put the question for the highest number first; and while he was proposing the question, Gen. Nathaniel Austin, a legal voter of said town in the choice of representatives, addressed the chairman, saying, before the question was taken, he wished to submit a few observations, and would detain the meeting but a short time; and then proceeded to offer reasons against the town's being represented by six, and in favor of its being represented by two. He had not uttered more than two or three sentences, when he was interrupted by Mr. Timothy Thompson, Senior, who said he understood it to be against the constitution and the laws to have debate on questions of that nature, and asked emphatically, if it was not against the constitution and the laws to debate such questions, and appealed to the two lawyers on the board of selectmen, meaning Leonard M. Parker and Elias Phinney, Esqrs., if it were not so, neither of whom re-

[1] 40 J. H. 7. [2] Same, 133, 152.

plied. The chairman instantly declared that it would be useless and improper to debate the question, and there could not be any debate; that he presumed, the voters came there with their minds made up to vote either for two or six. General Austin observed, he knew of no such law, and desisted from any further remarks on the subject, considering himself precluded by the decision of the chairman. Immediately after the observation of General Austin, that he knew no such law, the chairman put the question, directing those in favor of six to manifest it, and those in favor of two to manifest it, and declared the vote to be in favor of sending six representatives.

The committee further find, that not five minutes elapsed from the time Gen. Austin addressed the chairman, until the chairman put the question, and that no one of the selectmen dissented from the opinion expressed by the chairman against permitting debate, and that the voters were attentive to the observations of Gen. Austin, until he was interrupted by Mr. Thompson, Senior, and the declaration of the chairman, consequent thereon, against debate, when there was considerable clamor for the question.

The committee further find, that previous to the town-meeting consultation was had, and an arrangement made between some of the legal voters, for discussing the question of the number of representatives to be sent, and that they intended to offer their arguments in favor of sending two; and that Dr. Abraham R. Thompson, and Gamaliel Bradford, Esq., considering Gen. Austin 'to have been put down' by the decision of the chairman, and themselves, thereby, precluded from debate, did not attempt to offer any remarks on this subject.

When the chairman had, as aforesaid, declared the vote of the town to be in favor of sending six representatives, it was doubted, and a poll of the meeting demanded. Thereupon, the chairman directed those in favor of six to form on his right, and those in favor of two, to form on his left. The attempt to decide the question in this manner was unsuccessful; some supposing they were to take the right or left as they faced

the chairman, and others supposing they were to be governed by the right or left of the chairman as he stood. It was then agreed upon, and directed by the selectmen, for the decision of the question, that those in favor of sending two should pass out of the town hall and be counted first, and then those in favor of six should pass out in like manner and be counted, and some of the selectmen were to be the tellers. This duty by a consentaneous arrangement was undertaken by Leonard M. Parker, Richard Devens, Peter Tufts, and Elias Phinney, of the board of selectmen. The number counted in favor of two was two hundred and nineteen, and the number agreed by three, to have been counted in favor of six, was two hundred and seven; Mr. Parker said, the number he made in favor of six was two hundred and eight; but he was not satisfied with his 'count,' as he declared to the chairman, because he had been interrupted, by two having been challenged, as having voted before, and after conversation on the subject of these challenges, he took the numbers, which his brethren of the board had arrived at, from them, and proceeded with his counting. His dissatisfaction was further increased, because there were some in the entry, desirous of an opportunity to come into the hall, pass out, and be counted. How these intended to vote was not known, nor their number. It also appeared, that some were in the hall who had not passed out,—the selectmen and two or three others. While Messrs. Parker and Phinney were conversing on the propriety of permitting those in the entry and others to come in and vote, there was great pressure for admission to the hall, and the constable, who had guard of the door, took down his staff, and those without rushed in.

The numbers counted and the other circumstances were communicated to the chairman, and there were frequent and loud calls of the voters for a declaration of the result. The chairman answered, that, as there was no satisfactory result, there could be no declaration, and some other method must be resorted to, for a decision of the question. He then directed the voters in favor of six, to arrange themselves on one side of

the hall, and those in favor of two, on the other, and remain until they were counted. Confusion again arose. Many went to the middle of the hall, many declared the question had been fairly decided, and called for a declaration of the result; they were answered, there was no result to be declared. In this situation of things, many of those in favor of sending two left the meeting,—some saying to those in favor of two, 'clear out! the question has been taken fairly, and we ought to have the result declared, and no other method ought to be resorted to.' The chairman then put the question, to be decided by hand vote, and there appeared, at this time, a large majority for six, and the voters were called upon for their ballots, of which there were two hundred and seventy-seven given for the sitting members, and twenty-six ballots for two other persons, and Timothy Thompson, Jr., Philemon R. Russell, Peter Tufts, Thomas Harris, John H. Brown, and Richard Devens, were declared to be chosen.

The committee are satisfied of the purity of intention of the chairman, in the decision he made against debate, and which was not dissented from by either of the other selectmen. But the committee are unanimously of opinion, that it was an error of judgment on the part of the chairman, to prevent debate on a question regularly before the town, and in which the corporate rights of the town were involved. It is further the unanimous opinion of the committee, that the declaration of the chairman against debate, as aforesaid, not having been dissented from by either of the other selectmen, must be considered to have been the decision of the whole board.

And inasmuch as it hath been repeatedly decided by former houses of representatives, and by the judges of the supreme judicial court, that the right to send representatives to the general court is a corporate right, vested in the towns, and to be exercised by them at their discretion within the limits prescribed by the constitution, and it being evident, that this right cannot be fairly and freely exercised without reasonable debate, and fair discussion of the question, to what extent a town will choose to be represented, provided such debate and

discussion be offered, and such debate having been refused by the chairman and selectmen in this case, as aforesaid, the committee are unanimously of opinion, that the supposed election of Timothy Thompson, Jr., Philemon R. Russell, Peter Tufts, Thomas Harris, John H. Brown, and Richard Devens, as representatives of said town of Charlestown, was void, and that they are not entitled to seats in this house, and that the same be declared vacated."

This report was agreed to,[1] June 12th, by a vote of 128 to 53, and it was then

Ordered, that the committee on the pay roll be directed to make up the pay of the members returned from Charlestown, to that day inclusive.

CASE OF MOSES S. FEARING, RETURNED FROM WAREHAM.

The return of a member having stated that he was chosen "by the minor part of the electors present at the meeting," and it appearing that the election took place after a vote not to send, which had not been reconsidered, the election was held void.

Moses S. Fearing appeared in the house to take his seat as a member, returned from the town of Wareham, and produced the certificate of his election, by which it appeared, that he was chosen "by the minor part of the electors present at the meeting:" it was thereupon ordered, that the said return be committed to the committee on elections, to consider and report on the same, before the said Fearing be permitted to take a seat in the house.[2]

The committee subsequently reported:—

"That at a town-meeting, holden in said town of Wareham, on the 10th day of May now last past, it was voted by said town not to send a representative to the present general court, and that said vote hath not been reconsidered. The committee, therefore, are of the opinion that Moses S. Fearing, purporting by said return to have been on said day chosen to represent said town in the present general court, is not entitled to a seat."

The report was agreed to.[3]

[1] 40 J. H. 160. [2] Same, 64. [3] Same, 71.

RANDOLPH, FRYEBURGH.

[The elections in these towns were controverted on various grounds, but the committee on elections reported in both cases, that the allegations were not supported by proof, and their reports were agreed to unanimously.]

Note. In pursuance of the provisions of the act of 1819, c. 36, passed on the 19th of June, 1819, the district of Maine, which had before constituted a part of Massachusetts, soon afterwards became an independent state.

1820—1821.

1821—1822.

1822—1823.

[No cases.]

1823—1824.

COMMITTEE ON ELECTIONS.

Messrs. *Charles Turner*, of Scituate, *William Ellis*, of Dedham, *Francis Fiske*, of Cheshire, *Barnabas Hedge*, of Plymouth, *Robert Rantoul*, of Beverly.

HADLEY.

The inhabitants of a town entitled to send two representatives having voted, at a legal meeting for the purpose, to elect only one, the selectmen proceeded to receive the votes accordingly. While the balloting was going on, it was, on motion, voted to reconsider the first vote, and to elect two representatives. The balloting was then resumed, and an election of one member was effected. The selectmen then proceeded to receive votes for a second representative; and one being chosen, it was held, that the election of such member was valid.

The election of Nathaniel Cooledge, Jr., one of the two members returned from the town of Hadley, was controverted by Levi Dickinson, Jr., and others,[1] for reasons, which appear in the following report of the committee on elections:—

"To the election of said representatives, a petition or protest has been entered:—

1st. Because, at a more full meeting, the town by a large majority, voted to send only one.

2nd. Because one representative was sufficient, all that could be legally elected, and all that a majority of the inhabitants wished, or their interest required.

3rd. Because the election of Mr. Cooledge, the second representative, was effected by a much less number than the first, and after many inhabitants had left the meeting, expecting that only one would be chosen.

4th. Because the town of Hadley did not contain polls enough to entitle it, according to the laws and constitution of this commonwealth, to more than one representative.

Accompanying this petition is a copy of the proceedings of the meeting in said town of Hadley, on the said fifth of May, by which it appears, that the inhabitants voted first, that one representative be chosen for the ensuing year; that the meeting then proceeded to ballot for a representative, but before the balloting was completed, on motion it was voted, that the first vote be reconsidered; also voted, that two representatives be chosen for the ensuing year. The balloting for a representative was then completed, and all the votes given in (both

[1] 44 J. H. 9.

before and after the passing of the two last votes,) were sorted, counted, recorded, and publicly declared, as follows:— For Moses Porter, Esq., 65; Charles P. Phelps, Esq., 46; Deacon William Dickinson. 1; Moses Porter, Esq., was declared to be elected. Votes for another representative were then given in, all of which were sorted, counted, recorded, and publicly declared, as follows:—For Charles P. Phelps, Esq., 42; Hon. Samuel Porter, 4; Mr. Nathaniel Cooledge, Jr., 55; and said Cooledge was declared to be elected. No person appearing before the committee to substantiate the statements made by the petitioners, the committee have not been able to discover any thing in the proceedings of the inhabitants of the town of Hadley which can vitiate the returns, or deprive the sitting members or either of them of their seats. The only point, which it appeared necessary to have established was, whether the town contained ratable polls sufficient to entitle it to send two representatives. To this point the Hon. Samuel Porter was called, who stated that he was an assessor of said town, and assisted in making the highway tax, in April last, for the present year, and after the tax was completed he carefully counted the ratable polls, and found the number to be three hundred and ninety-seven. The fact being established that the town had a right to elect two representatives:—

The committee ask leave to report, that Moses Porter, Esq., and Mr. Nathaniel Cooledge, Jr., have been constitutionally elected representatives of the town of Hadley, for the current political year; and are entitled to their seats."

The report was agreed to.[1]

[1] 44 J. H. 46.

1824—1825.

COMMITTEE ON ELECTIONS.

Messrs. *Thomas Harris*, of Charlestown, *Samuel Swett*, of Boston, *Samuel M. McKay*, of Pittsfield, *John Merrill*, of Newburyport, *Francis C. Macy*, of Nantucket.

MARBLEHEAD.

A member, who resigned the office of deputy collector of the customs on the day of his election, and afterwards was occasionally employed as an inspector, but at the time of taking his seat held no office in the customs, is not disqualified to sit.

The election of William B. Adams, returned a member from the town of Marblehead, was controverted by John L. Harris and others, on the ground, that he was ineligible as a representative, by reason of his holding the offices of deputy collector and inspector of the customs, under the government of the United States.[1]

The committee on elections made the following report in this case, at the May session[2]:—

"The committee on elections have had under consideration the petition of John L. Harris and others, inhabitants of Marblehead, against the right of William B. Adams to hold his seat; they alleging that he is a deputy collector and an inspector of the customs, at said Marblehead, and in consequence not entitled to his seat. The petitioners have proved to the committee, that said Adams was a deputy collector on the 4th of May last, and that he has assumed to act, and did sign his name as such, on the 7th and 20th May, and that he has performed the duties of inspector, since his election to a seat in this house. On the other side, the collector of the customs,

[1] J. H. 12. [2] Same, 83.

for the district of Marblehead and Lynn, appeared before the committee, and under oath declared, that William B. Adams had been a deputy collector, but that he resigned that office on the 10th day of May last, the day on which the town meeting was held, for the choice of representatives to the general court; that he has had no authority to act in that capacity since, but was directed to settle up his accounts forthwith. He also declared as aforesaid, that there is no permanent inspector at Marblehead; that William B. Adams has occasionally been employed as inspector, but at the time of his taking his seat, he held no office whatever at the custom house. No other objection having been made, the committee believe, and hereby report, that William B. Adams is entitled to his seat."

The report was agreed to.

LYNN.

A town, having voted to send one and but one representative, at a meeting held for the choice of one or more representatives, may lawfully reconsider that vote, and elect an additional member, after having chosen one.

Where there are two persons in a town, of the same name for which votes are given, one of whom is constitutionally eligible, and the other not so, and the former is admitted to be the person for whom the votes are cast, the votes will be presumed to be intended for him.

The election of James Pratt, Jr., and Thompson Burrill, two of the members returned from the town of Lynn, was controverted by James Gardner and others, because the said Pratt and Burrill were not chosen until after the town had voted not to send but one representative, and had chosen one accordingly.[1]

At the January session, the committee on elections reported as follows, on this case[2]:—

"On the 13th day of May, 1824, a town meeting was held in Lynn, for the choice of one or more representatives from said town to the general court. After the meeting was opened,

[1] 45 J. H. 56, 119. [2] Same, 160, 165, 186, 187, 190.

a motion was made to send one representative, and one only; but before that motion was put, another motion was made to send six, which was put and decided in the negative. Other motions were then made, to send five, four, three, and two, and severally put and decided in the negative. The first motion, to send one, and one only, was then put and decided in the affirmative, by twenty-one votes in the affirmative, and nineteen in the negative, as appears by parol evidence, there being no record of the number of votes given. The voters were then called upon to bring in their votes for one representative. They were brought in and counted, and Ezra Mudge, Esq., was chosen, about eighty-five votes being given for him, and about twenty-five against him, as appears by parol evidence, no record of the numbers having been made. After the choice of one representative, a motion was made to reconsider the vote which had passed, to choose one representative, and one only, and being put, was carried in the affirmative, by about forty-five voting in the affirmative, and about twenty-nine in the negative, as appears by parol evidence. A motion was then made to choose two representatives, in addition to the one already chosen, and carried in the affirmative, (the town being entitled to that number and more.) The votes were then called for and carried in, and upon being counted, it was found that James Pratt and Thompson Burrill were chosen. The petitioners state, that the votes given for James Pratt were recorded as given for James Pratt, Junior. The facts are, that two men resided in said town, by the name of James Pratt. The person who claims the seat, is known in Lynn, by the name of James Pratt only, and is never designated as James Pratt, Junior; and the other James Pratt is a man very far advanced in life, known only as a day laborer, and ineligible to the office of representative. It is a fact, admitted by the petitioners, that the individual claiming the seat, was the one intended by the voters. The committee are unanimously of opinion, that, as no other James Pratt was eligible to the office, it would be doing violence to every sound rule of proceeding, in such cases, to presume that the electors

voted for one whom they could not constitutionally elect, when the individual intended was constitutionally eligible, and that no substantial objection arises, on this ground, to the member holding his seat. As to the first ground of objection, mentioned by the petitioners, the committee are of opinion, that notwithstanding a vote was passed, to choose one, and one only, yet it was competent for the town, while the town-meeting, called for the purpose of choosing one or more representatives, was open, to reconsider the vote to choose one only, and add two more; that in so doing, they exercised only their constitutional rights, and that no good cause is shewn for vacating the seats of the said James Pratt and Thompson Burrill. The committee have examined several reported cases of controverted elections, but have not been able to find any precisely like the one at bar; but, upon general principles, the committee feel warranted in the opinion above expressed, as well as from what they know to be the usage of towns, on the subject of reconsideration of votes. By a certificate of the town clerk of Lynn, the committee were informed that such was the usage of that town, when a larger number was present. The committee therefore report, that the said James Pratt and Thompson Burrill, are entitled to hold their seats."

The report was agreed to.

CHESTER.

Duty of the moderator of a town-meeting to make certain a vote when scrupled or doubted by a competent number of the voters.

THERE were two returns from the town of Chester, certified and signed by two different sets of selectmen, by one of which, it appeared that Silvester Emmons was elected, and by the other, that Asa Wilcox was elected. The election of the former was controverted by Nathan Ellsworth and others, and that of the latter by Asahel Wright and others, on the ground, in both cases, that the selectmen, by whom the respective elections were certified, were not duly elected.[1]

[1] 45 J. H. 42.

The committee on elections reported the following statement of facts, with their opinion thereupon:—

"At a meeting of the inhabitants of the town of Chester, qualified to vote in town affairs, on the 1st day of March, at 9 o'clock, A. M., (the legality of which is not questioned,) William Henry, the clerk of the town, opened the meeting in the usual manner, and called for the ballots for a moderator, which he received, sorted, and counted, and then declared that William Shepard was elected. Shepard signified his acceptance of the office, and called for ballots for a town clerk; and upon counting the ballots, it appeared that there was no choice. It appears that there was a motion made, (as is proved by a number of deponents, and the fact is not disputed,) to adjourn to the next day, at 9 o'clock, A. M. Thus far, there is no question but the proceedings of the town were correct and legal. The moderator put the motion of adjournment, and declared it was a vote to adjourn. The vote was doubted by more than ten persons, and the moderator said he must divide the meeting. The house was divided but not counted. At this time it was nearly dark. The moderator deposes, that he adjourned the meeting by power of the first vote, and that at the time of dividing the meeting, there was much noise and confusion. Some of the deponents state that the meeting was, or could be divided, and others that a division was not, or could not be effected. It also appears by a number of depositions, that the moderator made this declaration: 'by power or authority vested in me, I adjourn this meeting, until tomorrow at 9 o'clock, A. M.,' at the time, when the inhabitants dispersed. The moderator deposes, that he requested the town clerk to record the adjournment of the meeting, and that he declined, on the ground of its illegality.

On the second day, there was a full meeting, as many being present, as on the first day. The moderator called for the ballots for a clerk, and having counted them, he declared Otis Taylor elected by a majority of one vote. Taylor was duly sworn, and officiated. It was then voted to choose three selectmen, who should also be assessors. On counting the

votes at the second ballot, (there being no choice on the first) it appeared, that Forbes Kyle had 143 and Isaac Whipple 142 votes. It appears that the number of names checked on the list of voters, was 282. The moderator deposes, that he declared Forbes Kyle to be elected first selectman. Henry, the town clerk, deposes, that no declaration of a choice was made by the moderator, but that he said there were more votes than voters. The moderator also deposes, that a man, whom he named, was suspected of putting in more than one vote; that he saw him put in a large vote, and that when he took away his hand, a small piece of paper, say the size of a vote, adhered to it. After the declaration of the result of the second ballot for first selectman, there was much noise and confusion, and when the ballots were called for the second selectman, the confusion increased, and there was a cry of, 'no vote,' 'illegal,' &c. Before any votes were cast for second selectman, the moderator deposes, that a motion was made to adjourn to 22d March, on condition of beginning with balloting for first selectman; that he put the motion, and declared it a vote; that it was disputed, and he ordered a division, but did not succeed. It appears there was much confusion at this time, and that the moderator said, 'I adjourn this meeting for two weeks,' and that, soon after, he declared, 'I adjourn this meeting to the 22d day of March, at 9 o'clock, A. M.;' that Taylor recorded that the moderator adjourned the meeting, and that on the 22d March, he added, by direction of the moderator, these words, 'according to vote of the town.' It appears that the hands raised for and against the adjournment, both on the first and second days of March, were not counted. It is stated by one deponent, that the moderator said, 'I adjourn by vote of the town.' On the supposed illegality of the meeting, and the adjournment thereof, application was made by twelve freeholders, to the selectmen chosen in 1823, to warn a meeting of the inhabitants to assemble for the choice of town officers. Pursuant to such warrant, a part of the inhabitants assembled, as therein directed, to wit: on the 22d day of March, at 8 o'clock, A. M. William Henry, the town clerk for 1823,

opened the meeting, by reading the warrant and the return thereof. About this time, or at 9 o'clock, William Shepard and many others with him came into the meeting. Said Shepard demanded his seat as moderator, and was refused. He then made declaration, that the meeting was adjourned to the school-house, and soon afterwards said, to the centre school-house, to which place many voters repaired, and there elected Samuel B. Stebbins, as second selectman and assessor, and John Hamilton, third selectman and assessor, and Horace Smith, as constable, with other officers required by law to be chosen in the month of March or April, annually.

The voters who remained at the meeting-house, Mr. Henry presiding as moderator, made choice of Isaac Whipple for moderator, and William Henry for town clerk, and Isaac Whipple, James Nooney, Jr., and Charles Collins, as selectmen and assessors, (the same who were selectmen and assessors, the preceding year.) They also chose Martin Phelps, Jr., constable, and such other officers as are required by law, to be chosen in the months of March or April, annually.

Pursuant to a warrant, directed by said Kyle, Stebbins, and Hamilton, as selectmen, to said Smith, as constable, notifying the voters qualified as the law directs to assemble and give in their votes for a representative to the general court, a part of the inhabitants of Chester assembled on the 3d day of May, and made choice of Silvester Emmons, Esq., for their representative, whose election was duly certified by Kyle, Stebbins, and Hamilton, as selectmen of said town, and who was notified by Horace Smith, as a constable of the town of Chester.

Pursuant to a warrant directed to Martin Phelps, Jr., as constable, by Whipple, Nooney, Jr., and Collins, as selectmen, to notify the inhabitants qualified as the law directs, to assemble and give in their votes for a representative to the general court, a part of the inhabitants of Chester aforesaid assembled on the 10th day of May, and made choice of Asa Wilcox, Esq., as their representative, whose election was duly certified by said Whipple, Nooney, Jr., and Collins, as selectmen, and who was notified by Martin Phelps, Jr., as constable for the town of Chester.

Upon mature consideration of the foregoing facts, the committee report:—

"That, in their opinion, the adjournment of the meeting of the town of Chester, on the first day of March last, was illegal, inasmuch as that when the moderator had put the question of adjournment, and had declared it to be a vote, and when such vote was 'scrupled or questioned by seven or more of the voters present,' he did not 'make the vote certain by polling the voters,' the meeting not having desired the vote to be decided in any other way; that an attempt to divide being unsuccessful, no attempt was made to count the voters and ascertain the will of the town.

That, at a meeting of the inhabitants of said town of Chester, duly notified and warned by Martin Philips, Jr., constable of said town, pursuant to a warrant issued by Isaac Whipple, James Nooney, Jr., and Charles Collins, as selectmen of Chester, at the request of Asa Wilcox and eleven others, freeholders and inhabitants of said town, for the purpose of choosing town officers, the said Isaac Whipple, James Nooney, Jr., and Charles Collins, were legally chosen selectmen of said town; and the said selectmen have certified, according to law, that Asa Wilcox was duly elected, on the 10th day of May last, by the freeholders and others, inhabitants of the town of Chester, qualified voters, to represent them in the general court, to be assembled on the last Wednesday of said month. The committee are of opinion, and hereby report, that Asa Wilcox is entitled to a seat in this house.

The committee further report, that the meeting at the centre school-house, in Chester, on the 22d day of March last, being, in their opinion, illegal, Forbes Kyle, Samuel B. Stebbins, and John Hamilton, who have made return as selectmen of said town, in the usual form, that Silvester Emmons was duly elected, on the third day of May last, at a meeting notified and warned, in pursuance of a warrant by them issued to Horace Smith, as constable of said town, were not the selectmen of said town, and that, for the same reason, Horace Smith was not constable of said town.

The committee are of opinion, and hereby report, that Silvester Emmons is not entitled to a seat in this house."

This report was made at the May session, and referred from thence to the January session,[1] but does not appear to have been afterwards acted upon.

[1] 45 J. H. 119.

1825—1826.

COMMITTEE ON ELECTIONS.

Messrs. *Amos Spaulding*, of Andover, *Franklin Dexter*, of Boston, *Francis C. Macy*, of Nantucket, *Ephraim Buttrick*, of Cambridge, *David S. Greenough*, of Roxbury.

CASE OF JOHN SHEPLEY, MEMBER FROM FITCHBURG.

A member removing from the commonwealth becomes thereby disqualified from holding his seat.

At the commencement of the January session, a letter was received from John Shepley, member from Fitchburg, announcing, that since the adjournment, he had removed his family to Saco, in the state of Maine, where he intended to reside.[1] The subject underwent considerable discussion, and it was finally determined that his seat was vacated by the removal.[2]

A motion was then made, that a precept be issued to the town of Fitchburg, to choose a representative, in the room of Mr. Shepley,[3] which motion, upon discussion, was indefinitely potponed.[4]

[1] 46 J. H. 167. [2] Same, 180, 183, 184, 190. [3] Same, 194. [4] Same, 198.

CASE OF JOSEPH DOWNE, JR., MEMBER FROM FITCHBURG.

A member chosen during the sitting of the general court, to fill a vacancy occasioned by the removal of another from the commonwealth, but without a precept, is not entitled to a seat.

JOSEPH DOWNE, JR., returned a member from the town of Fitchburg, to supply the vacancy occasioned by the removal of Mr. Shepley from the commonwealth, (see the preceding case) appeared, was qualified and took his seat in the house:[1] and the return of his election was referred to the committee on elections.[2]

The committee made a report, giving a statement of the facts relating to the election, and concluding with a declaration, that Mr. Downe was not entitled to a seat.[3]

The report was considered and debated in the house, and in committee of the whole, on five several days, and finally accepted by a vote of 53 yeas to 45 nays.[4]

The committee on the pay roll were then directed to make up the pay of Mr. Downe, for his travel and attendance, as a member.[5]

[1] 46 J. H. 270. [2] Same, 269. [3] Same, 330. [4] Same, 359, 365, 372, 387. [5] Same, 391.

1826—1827.

COMMITTEE ON ELECTIONS.

Messrs. *Laban Marcy*, of Greenwich, *Andrew Dunlap*, of Boston, *Minot Thayer*, of Braintree, *Joseph H. Prince*, of Salem, *David Stetson*, of Charlestown.

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, CONCERNING THE FILLING OF VACANCIES IN THE HOUSE, AND THE ELECTION OF MEMBERS THEREOF TO THE COUNCIL.

Vacancies in the house, other than those enumerated in the 2d section of the 6th chapter of the constitution, may be filled.

Members of the house of representatives may constitutionally be elected to the council.

At the May session, it was

Ordered, That the committee on elections be directed to report, at the next session, whether any vacancy can be filled in the house of representatives, except such as are enumerated in the second section of the sixth chapter of the constitution;

Ordered, That said committee report, whether any member of the house of representatives can constitutionally be elected to the council board;

Ordered, That said committee, in the name of the house require of the justices of the supreme judicial court their opinion on these subjects.[1]

In pursuance of these orders, the committee laid the questions proposed before the court, and at the January session, the following opinion was received[2]:—

"To the honorable the house of representatives of the commonwealth of Massachusetts.

The justices of the supreme judicial court have attended to the questions, to which by a vote of the house, passed 17th June, 1826, their answer was required, and submit the following as their opinion thereon:—

The first question is, whether any vacancies can be filled in the house of representatives, except such as are enumerated in the 2d article of the sixth chapter of the constitution?

The second, whether any member of the house of representatives can be constitutionally elected to the council board.

We take the liberty to transpose the order of the questions, since the answer to the second involves some considerations, which are of importance in the consideration of the first.

[1] 47 J. H. 136. [2] Same, 178.

And we are of opinion, that there is nothing in the constitution, which disqualifies, or renders ineligible, a member of the house to a seat in the council.

The 2d article of section 3d, chap. 2, of the constitution, provides for the choice of nine counsellors, from the persons returned for counsellors and senators, with this further provision, that 'in case there shall not be found, upon the first choice, the whole number of nine persons, who will accept a seat in the council, the deficiency shall be made up, by the electors aforesaid, from among the people at large.

We think the framers of the constitution, and the people who adopted it, intended only, by this provision, to exclude the implication, that successive elections should of necessity be made from the senate; which implication might have existed without this provision, since by the constitution, the members of that board are all chosen by the people, counsellors as well as senators.

Members of either branch of the legislature continue to be of the people, for they have no distinct privileges, but only a trust or duty to perform for the people; and therefore, when it is provided that the second choice shall be from among the people at large, we think all citizens are comprehended within that description, who are not disqualified by the constitution to hold a seat in the council; and that the real intent was to leave the choice entirely unrestricted, after an attempt should have been made to fill up the council from the senate.

Such we believe has been the practical construction of the constitution in this particular; for it appears, from the journals in the secretary's office, that on the very first year after it went into operation, a member of the house of representatives was elected a counsellor, and took his seat at that board; and that many such elections were made, between that time and the year 1823.

Cotemporaneous expositions of doubtful provisions in all instruments, and particularly in legislative enactments and constitutional charters, are held to be legitimate and useful sources of construction.

What has been done in the beginning, and has continued to be done for a long series of years, without any question as to the rightful power or authority on which such acts have been predicated, may be presumed, by succeeding public agents, to have been rightfully and properly done; in case no private right or public immunity is invaded.

We therefore do not hesitate to give our opinion, that a member of the house of representatives can, constitutionally, be elected to the council board.

In regard to the other question, whether any vacancies can be filled in the house of representatives, except such as are enumerated in the second article of the sixth chapter of the constitution, we answer, that what we understand to have been the practice, namely: to fill vacancies made by the election of a member of the house to a seat in the senate, or the council, may well be supported by the principles of the constitution, and by analogy to certain cases, provided for by that instrument.

It was evidently the intent of the framers of the constitution, to recognize the right of towns, whose representatives had been called by the constituted authorities to the exercise of some other public duty, inconsistent with their legislative functions, to supply their place by a new election; as will appear by the numerous cases provided for in the article of the constitution cited in the question proposed. It was probably not contemplated that seats would be vacated by a legislative election to another department of the government, and therefore that case is not provided for.

But it is to be considered that every town, having the number of polls required by the constitution, has a right to be represented in the popular branch of the legislature; and that this is a valuable and important right, of which the inhabitants ought not to be deprived without their own consent. In the case supposed, the inhabitants of the town have signified their intent and desire to avail themselves of this right, by the actual election of a member. In addition to the common interest, which they have in the general concerns of the state, in the

management of which they are entitled to a voice, they may have important local interests, which, in their opinion, require the special care and attention of one of their own body. Now, if, by the removal of their representative into the senate or the council, they must remain unrepresented, they are virtually disfranchised for the current year; and this, by the two branches of the legislature, who, if they have not imposed a duty, have offered strong inducements to the representative of the town to forsake the place, to which he had been elected with a view to the particular interests of the town, as well as the general interests of the public.

The case may be different where the seat shall be vacated by death, resignation or removal out of the state; for these are contingencies of which towns may be supposed to take the risk, when they make their election. Our opinion is confined to the case of a seat vacated by the interference of the constituted authorities, who have called the representative to another sphere of public duty; and in such case, we think his place may be supplied by the town he represented, because they would otherwise be deprived of their voice in the legislative department, without their consent; and this would be contrary to one of the fundamental principles of a free representative government. We think, therefore, that what we understand to have been the settled practice of the house, in similar cases, is founded upon a just view of the principles of the constitution, and upon analogy to the cases, for which express provision has been made; it appearing from these cases, that whenever a representative has been called to the exercise of any public trust, which disqualifies him for a seat in the house, the framers of the constitution and the people thought the town, which he represented, ought not thereby to lose its voice in the legislative councils.

We ask leave further to suggest, that as every town has, originally, a right to decline being represented, subject to the power of the house to impose a fine for the neglect; so, this right would remain when called upon by a precept from the house, requiring them to make a new election; for this precept

cannot be of greater force than the constitution, which, according to decisions heretofore made, leaves the option to the towns to be represented or not, on the condition above stated.

For the foregoing reasons, we are of opinion, that vacancies in the house of representatives, other than such as are enumerated in the 2d article of the 6th chapter of the constitution, being of the kind supposed in the preceding remarks, may be filled by new elections.

All which is respectfully submitted,

(Signed) ISAAC PARKER,
SAMUEL PUTNAM,
S. S. WILDE,
MARCUS MORTON."

The committee then reported, in accordance with this opinion :—

First, that vacancies can be filled in the house of representatives, except [and other than] such as are enumerated in the 2d section of the 6th chapter of the constitution; as, where a member of this house is elected by the legislature a member of the senate, and called up to that board, the vacancy thereby created, in the opinion of the committee, may be filled up.

Secondly, that a member of the house of representatives can be constitutionally elected to the council board.[1]

The report was agreed to.[2]

[1] 47 J. H. 178. [2] Same, 191, 198, 199.

1827—1828.

COMMITTEE ON ELECTIONS.

Messrs. *Laban Marcy*, of Greenwich, *Thomas P. Beal*, of Kingston, *Elisha Mack*, of Worthington, *Lester Filley*, of Otis, *Solomon S. Whipple*, of Salem.

BARRE.

It was held no objection to the qualification of a member as to property, that he was rated in the valuation at two hundred dollars, personal estate, and no more, and that his real estate (but whether the whole or a part only did not appear) had been set off on execution.

THE election of Gardner Ruggles, returned a member from the town of Barre, was controverted by Otis Sherman and others, on the ground, that said Ruggles did not possess sufficient property to qualify him, according to the constitution, for the office of representative.[1]

The petitioners produced in evidence an affidavit of one of the assessors of the town of Barre, dated May 25th, 1827, stating that the valuation of the personal property of Mr. Ruggles, for the year 1826, was two hundred dollars and no more; and also, a certificate of the register of deeds for the county of Worcester, stating that eleven executions were recorded in his office, in the year 1822, against the said Ruggles, on which real estate was set off to the respective creditors therein named, and that he did not find on record any conveyance of land to the said Ruggles subsequent to that time.

On this evidence, the committee on elections reported, that Mr. Ruggles was entitled to his seat. The report was agreed to.[2]

WINDSOR.

Whether it is any objection against the validity of an election, that the votes were given in without the list of voters being called; that persons were allowed to vote, whose names were not on the list; and that some of the voters, whose qualifications were questioned, were allowed to withdraw their votes—*Quære.*

THE election of Asa Hall, returned a member from the town of Windsor, was controverted by Elijah Turner, Jr.,

[1] 48 J. H. 6, 20. [2] Same, 54.

and others, for the following reasons, alleged in their petition:—

"That, at the meeting for the election, the votes were cast, without the list of voters being called; that some persons, whose names were not on the list, voted; and, that, during the balloting, the selectmen allowed four persons, who had voted, and whose right to vote was disputed, to put their hands into the box containing the votes, and to take out such as they pleased."

The committee on elections, to whom the petition was referred, reported, that, from the evidence submitted to them, the said Hall appeared to be duly elected.[1] [It does not appear, that any documentary evidence was laid before the committee, either to prove or disprove the allegations in the petition; and it cannot be determined from their report, whether they decided in favor of the election, because the allegations against it were not proved, or because they considered the objections groundless.]

The report was agreed to.

CASE OF WILLIAM B. ADAMS, MEMBER FROM MARBLEHEAD.

Where a member in fact performed the duties of a deputy collector of the customs under the United States, from the close of the first session of the general court to the commencement of the second, he was held to be thereby disqualified to hold his seat.

In a discussion of the question, upon the reconsideration of a vote adopting a report, whereby the seat of a member was vacated, it was ruled by the speaker, that evidence might be introduced in support of, but not against, the motion to reconsider.

WILLIAM B. ADAMS being returned a member from the town of Marblehead, and having been duly qualified and taken his seat in the house, the committee on elections were directed to inquire into his right to hold the same.[2]

The committee, on the second of February, made the following report[3]:—

"The committee on elections, who were instructed to inquire

[1] 48 J. H. 10, 54. [2] Same, 220. [3] Same, 271.

into the right of William B. Adams, of Marblehead, to a seat in this house, have attended to that duty, and held several meetings in relation thereto, by adjournment, at his request, at all of which he was present, and now they respectfully report: —

That William B. Adams was duly returned as a member of this house, and, having taken the requisite oaths, took his seat one day, in this house, at the June session thereof; and that it was clearly proved, by the testimony of several witnesses, who voluntarily presented themselves before the committee, and were examined, under oath, and by the inspection of sundry custom house official documents, which were furnished the committee, that William B. Adams did, from the end of the June session, of this present general court, to the third day of January last, inclusive, do and perform the duties of a deputy collector of the district of Marblehead and Lynn, in this commonwealth; that during this period, he administered the usual custom house oaths, certified invoices of imported goods, and signed coasters' clearances, as deputy collector aforesaid; and that he was, during the time aforesaid, in the habit of performing such and similar duties, during the presence or absence of the collector of the said district. The committee find, that by an act of the United States, passed March the second, 1799, the collectors of the customs may, during their sickness, or occasional and necessary absence, and not otherwise, appoint a deputy, duly constituted, under their hands and seals, to act in their behalf, in the discharge of the duties of their office, and that, by the seventh section of another act, passed on the 3d of March, 1817, the several collectors of the United States are authorized to nominate and appoint one or more deputies, with the approbation of the secretary of the treasury, who, in said act, are declared to be officers of the customs, and are required to take an oath of office.

By the eighth article of amendment of the constitution of this commonwealth, it is provided, that no person, holding any office under the authority of the United States, (postmasters excepted,) shall, at the same time, have a seat in this house.

The committee, having no power to send for persons or papers, had no means of ascertaining by virtue of what authority Mr. Adams assumed to discharge the official acts aforesaid; but the committee are of the opinion, that the acts and doings of Mr. Adams, as aforesaid, are *prima facie* evidence, that, from June last, to the third day of January last, inclusive, he held the office of deputy collector of the district of Marblehead and Lynn, and that holding said office under the authority of the United States is incompatible with a right to a seat; and they do accordingly report, that William B. Adams, of Marblehead, is not entitled to a seat in this house."

The report was agreed to,[1] on the ninth of February, by a vote of 88 to 71, and Mr. Sedgwick, of Stockbridge, then gave notice, that he should move a reconsideration of the vote, on the succeeding Monday.

On the eleventh of February, Mr. Sedgwick, pursuant to the notice given by him, moved a reconsideration of the vote, whereby the said report was accepted. During the discussion which ensued on this motion, Mr. Bliss, of Springfield, was proceeding to submit to the house, as an argument against the reconsideration, certain evidence tending to shew, that the said William B. Adams was considered, and returned, by the secretary of the treasury of the United States, as an officer of, and in the pay of the United States, when he was called to order by Mr. Sedgwick. The speaker decided that it was not in order, to submit this evidence to the house, as an argument against the reconsideration, inasmuch as Mr. Adams having been virtually suspended from his seat, by the decision of the house accepting the report, was not, and could not be present, to repel or explain it; but that any evidence, offered in support of the motion to reconsider the vote, would be admissible, the same objections not existing against its reception. No appeal was made from the decision of the chair. The question being then taken on the motion to reconsider, it was decided in the negative, by a vote of 126 to 75, and the report of the committee was ordered to be inscribed on the journal.[2]

[1] 48 J. H. 302. [2] Same, 307, 8, 9.

A motion was subsequently made, that the committee on the pay roll be directed to make up the pay of Mr. Adams, for his travel and attendance, as a member, and, after consideration, was decided in the negative.[1]

On the fourteenth of January, 1831, Mr. Adams petitioned for an allowance of pay, as a member, until his seat was vacated as abovementioned. The committee on elections, to whom his petition was referred, reported a resolve in his favor, which was rejected by the house.[2]

[1] 48 J. H. 357, 360, 362. [2] 51 J. H. 148, 246, 285.

1828—1829.

COMMITTEE ON ELECTIONS.

Messrs. *John B. Davis*, of Boston, *Solomon S. Whipple*, of Salem, *Joel Hayes, Jr.*, of South Hadley, *Francis Perkins*, of Fitchburg, *Thomas A. Greene*, of New Bedford.

ATTLEBOROUGH.

Three members being returned, and the selectmen having certified in the return, that two of them were duly elected, and, in relation to the third, a statement of facts, upon which they referred to the house the question whether such member was duly elected, the house thereupon instituted an inquiry into the validity of the election. Question whether votes for persons, not eligible as representatives, can be considered and counted as votes, in determining the whole number cast.

The return from the town of Attleborough certified, that two of the members returned were duly elected, and, in relation to the third contained a statement of facts, upon which the selectmen of said town referred the question, whether Israel Hatch, the member thus returned, was duly elected or not, to the determination of the house.

The committee on elections, to whom the return was committed,[1] at the May session, made the following report thereon,[2] at the ensuing January session: —

"That at a meeting legally held for the choice of representatives, in the town of Attleborough, on the 5th day of May last, it was voted to send three representatives; that said representatives were balloted for separately; that, at the first two ballotings, the two members returned from said town appear to have been duly elected; that eight several ballotings were had for the choice of the third representative, at each and all of which the selectmen present and presiding declared, that there was no choice; and that, after these eight ballotings had been thus completed, the meeting was duly adjourned to the 10th day of May last, when it was, in legal town-meeting, voted to reconsider the vote to send three representatives, and to send but two, and the meeting was then dissolved. At each of the aforesaid eight ballotings, the sitting member, Israel Hatch, Esq, had a plurality of the votes given in. The certificate of the selectmen, by him presented, states this fact, and concludes, conditionally, in the following words: —

'If the votes for David Pidge, Lydia Jones, Hannah Pidge, Mary Lathrop, and Redmond Clafflin ought not to be counted, on the ground of their ineligibility to the office of representative, then was the said Israel Hatch, Esq., elected as the third representative to represent said town as aforesaid.'

The committee ascertained, that the entire rejection of the votes for Lydia Jones, Hannah Pidge, Mary Lathrop, and Redmond Claflin, would not, at any one balloting, affect the result. After a patient investigation, protracted, at the repeated request of the sitting member, a yet further continuance was granted, to give him an opportunity to produce evidence, that he had a majority of the legal votes, at any one balloting; but the only evidence to this effect, by him produced, was the deposition of one Benjamin C. Richardson, which, in the opinion of the committee, is not entitled to credit. As to the eligibility of David Pidge, the committee

[1] 49 J. H. 34, 41, 80. [2] Same, 193.

found the evidence to be, that he had the constitutional qualifications, as to property and residence; but that he had been convicted of larceny, and had never received the executive pardon. The committee were of but one opinion, as to the conduct of those voters, who could so trifle with the elective franchise; but, as the votes, thus given, appear to have been given by legal voters, and as it therefore appeared, that, at no one of the eight ballotings, did Israel Hatch, Esq., have a majority of all the legal voters, voting for representatives for the town of Attleborough, the committee were unanimously of opinion, that said Israel Hatch, Esq., was not duly elected a member of this house, according to the constitution and laws of this commonwealth; and they report accordingly, that he is not returned a member of this house, to the acceptance thereof; and that he is not entitled to his seat in the same."

The report was recommitted,[1] and on the thirteenth of February, the committee reported,[2] that they had again, at three several sessions, heard the parties and examined the various proofs and allegations adduced by the sitting member, and other persons interested in his case, and had found no reason to change their former report, which they therefore reported without amendment.

The report was placed among the orders of the day, and on the sixteenth of February was agreed to.[3]

A resolve, providing for the pay of Mr. Hatch, was afterwards introduced and rejected by the house.[4]

[1] 49 J. H. 214. [2] Same, 279. [3] Same, 293. [4] Same, 392.

1829—1830.

COMMITTEE ON ELECTIONS.

Messrs. *James C. Merrill*, of Boston, *Elisha Hubbard, Jr.*, of Williamsburg, *Samuel Burr*, of Concord, *Solomon Lincoln, Jr.*, of Hingham, *Gayton P. Osgood*, of Andover.

BERKLEY.

Where two selectmen only, out of three, were present at an election, it was held, that a certificate, signed by one of them (the other being the member chosen) and the absent selectman, was "to the acceptance of the house."

Where a person, who was in possession of real estate, of the yearly value of from twelve to fifteen dollars, to which he had no legal title, had received assistance from the town, for the support of a minor child who was an idiot, and had also, for that reason and on account of his poverty, been exempted from taxation for several years, it was held, that he was not qualified to vote in the election of representatives.

If one, who is not a legal voter, throws a vote into the ballot box, before the presiding selectman has time to forbid him, it is the duty of such selectman to withdraw the vote from the box.

The election of Samuel French, Jr., returned a member from the town of Berkley, was controverted by John Dean and others,[1] for reasons, which are fully stated in the following report of the committee on elections: —

"That a meeting, duly and legally warned for the choice of a representative to this legislature, was there held on the eleventh day of May last; that the whole number of votes given in at the election was seventy-one; necessary to a choice, thirty-six; that said French, Jr., had thirty-six votes, and was declared to be elected.

The petitioners object, that the certificate of the election of the said Samuel French, Jr., is signed by George Sanford and Henry Crane, two only of the three selectmen; that Crane was not present at the meeting; that French, Jr., though a selectman and present, did not sign the certificate; that the law requires, that a major part of the selectmen present at the meeting shall sign the certificate; and that as the requisition of the law has not, in this particular, been complied with, the certificate is void.

The petitioners further allege, that the name of Robert Sanford, an inhabitant of that town, and a qualified voter for a representative, was stricken from the list of voters, immediately previous to the election, by said Samuel French, Jr., who was one of the selectmen of that town; that said Robert Sanford

[1] 50 J. H. 50, 100, 150.

did, on the same eleventh day of May, in open town meeting, offer his vote or ballot to George Sanford, then presiding in the meeting as chairman of the selectmen, which vote was by him rejected, and that he, the said Robert Sanford, was thereby prevented from voting.

The petitioners further state, that, at the same meeting, one Stephen B. Burt having voted, the said George Sanford, chairman of the selectmen, took from the ballot box a vote or ballot, under the pretence, that it was the ballot, which the said Stephen B. Burt had deposited in the box, when from the position in which the said George Sanford stood, it was impossible that he should have seen the ballot, which the said Stephen B. Burt had deposited in the box, or the name which it bore.

And further, that if the said Robert Sanford had been permitted to vote, or if the ballot actually deposited by the said Stephen B. Burt had not been withdrawn, the election might have resulted differently.

The petitioners further represent, that the said election was conducted partially and unjustly, and in subversion of the right of suffrage.

As to the charge of partiality and misconduct, on the part of the selectmen, in conducting the meeting, the committee are of opinion, that the same is wholly unsupported by evidence.

The committee are also of opinion, that the certificate of the election of Mr. French ought to be considered by this house as sufficient. The statute relating to that subject requires, that 'the selectmen present or a major part of them shall sign a certificate, &c., or such election shall be certified to the house of representatives to their acceptance.' As no fraud or misconduct appears, with regard to the certificate, and as the reason why it was not signed by the two selectmen present was, that said French, from motives of delicacy, did not think it proper to sign the certificate of his own election, the committee presume, that the certificate will be considered sufficient.

It was agreed, that Stephen B. Burt was not a legal voter. George Sanford, the presiding selectman at the meeting, testified, that before he had time to forbid him, said Burt precipitately threw his vote into the box, and that he immediately drew the same vote from the box. He further states, that he put the vote, thus taken out, into his pocket, and did not know, until after the meeting, for whom the vote was given. After the meeting he found the vote to be for Samuel French, Jr. Mr. Dean Burt testified, that the presiding selectman stood in such a situation, that, in his opinion, he could not have known, that he took out of the box the vote put in by Stephen B. Burt. The testimony of Dean Burt being matter of opinion, and that of the presiding selectman being positive, the committee are of opinion, that the vote thus taken out of the box was the vote put in by Stephen B. Burt; and, that the presiding selectman, knowing it to be the vote put in by said Burt, not only had a right, but that it was his duty, to take it out of the box.

Much evidence was produced before the committee, relating to the rejection of the vote offered by Robert Sanford. That part of the evidence, deemed by the committee to have a bearing on the question, is, in substance, as follows:— Robert Sanford, whose vote was rejected, deposed, that he attended said meeting for the choice of representative; that after the meeting was opened, he went forward to the selectmen, and presented his vote to the chairman, who refused to receive it, giving as a reason, that his, Robert Sanford's name, was not on the list of voters; that when he presented his vote, he claimed the right of voting, but was refused; that his name had been on the list of voters in the month of March previous; and that he had not received any notice, that the selectmen would meet to correct the list of voters. It appears in evidence, that Robert Sanford has lived in the town of Berkley for the greater part of the time during the last thirty years; that he has occupied a small estate, consisting of a dwelling house and about an acre of land, which he considered as his own, but he never had a deed of it. The annual income of said estate is estimated

to be worth, to the said Robert Sanford, from twelve to fifteen dollars per annum, to others worth a less sum. There is no evidence before the committee, that said Sanford has been assessed or paid a tax within the last nine years. The reason why he was not taxed was, that he had three idiot children, two of them more than twenty years of age. Sanford has received assistance from the town for three or four years past, for the support of the two children who were of age in 1825. When he applied for assistance from the town, for the support of the idiot child under the age of twenty-one years, he was told by the selectmen, that if he should receive assistance for the minor child, he would not have a right to vote. On hearing this statement, he declined receiving such aid. One of the selectmen said, that he made this remark from motives of policy, hoping thereby to save some expense to the town. In 1826, however, he made a written application for assistance for himself and family, but did not receive it, except as above stated. The reason why said Robert Sanford has not been assessed was as before stated, and also that he was poor, and had not been considered by the assessors as able to pay a tax, if assessed. His name had not been on the list of voters for the last eight or nine years, until a few days previous to the last March meeting. It was then put on the list, but was struck from it, at, or soon after, the time appointed for said meeting for the choice of representative. It was struck off before the meeting was opened. If Robert Sanford had been permitted to vote, he states that he should have voted for Barzillai Crane. Robert Sanford's name is not on the list of petitioners. The number of names on that list is twenty-two. Seven of that number have petitioned this house for leave to withdraw their names from the petition. The committee, respectfully submitting this statement to the house, report, that, in their opinion, the said Samuel French, Jr., is entitled to his seat."

The report was made at the January session,[1] and when it

[1] 50 J. H. 232.

came up for consideration, Mr. Eddy, of Middleborough, moved to add thereto the following as an amendment:—

"There was no evidence, that the selectmen of said town gave any notice of any meeting, for the purpose of correcting the list of voters, except the following, to wit:—The selectmen posted up a list of voters, on the sixteenth day of February, 1829, on which was inserted the name of Robert Sanford; and that list gave notice, that 'the selectmen would be in session, at the public meeting-house, in said town, on the second Monday of March then next, for the purpose of correcting the list of voters.' At the time of striking off said Robert Sanford's name, the same list was brought forward, and another name inserted thereon."[1]

The report and the proposed amendment were then recommitted to the committee on elections.[1]

On the fifth of February, the committee again submitted their former report, without amendment. Mr. Eddy renewed his motion to amend, which had been referred to the committee, but the house refused to sustain the same. Mr. W. W. Blake, of Boston, moved to amend the report, by reversing the conclusion thereof. This motion was also lost, and the report was then agreed to.[2]

CHARLEMONT.

Where a member was elected by ninety-two out of one hundred and thirty-two votes given in, it was held, that the reception of one illegal vote, if proved, would not invalidate the election.

The election of Obadiah Dickinson, returned a member from the town of Charlemont, was controverted by Anson Mayhew and others, on the following grounds, stated in their petition:—1. That one Enos Taylor, who had not been resident within the said town for six calendar months next preceding the election, was permitted to vote therein; and 2.

[1] 50 J. H. 256. [2] Same, 263.

That they had reason to believe, that an undue and improper influence had been exercised to induce Taylor and others to vote for Dickinson.

By a certificate of the town clerk of Charlemont, it appeared, that, at the election, the said Dickinson received ninety-two out of one hundred and thirty-two votes which were given in.

The committee on elections reported, that if the facts set forth in the petition were fully proved, they would have no tendency to impair the right of said Dickinson to his seat. The report was agreed to.[1]

PELHAM.

The receiving of votes, after the poll is closed, if irregular, is not, it seems, sufficient to invalidate an election, unless the result is thereby affected.

The election of Ziba Cook, returned a member from the town of Pelham, was controverted by Edmund Mirick and twenty others, on the following grounds alleged in their petition, to wit: that the election was effected by forty-eight votes for the sitting member, against forty-seven given for other persons; that one vote, which was for the sitting member, was received and counted, after sufficient time had been allowed for all persons to vote, and the poll had been closed, the box turned, and the selectmen were counting the ballots; and that two persons, who had removed from Pelham, were allowed to vote in the election, and did vote for the sitting member.

The case being referred to the committee on elections, affidavits were laid before them, to prove the allegations in the petition. From one of them, it appeared that three votes, two of which were for the sitting member, were received after the poll had been closed, as alleged in the petition; and in another it was stated, that one vote was so received and counted for

[1] 50 J. H. 38, 93.

the sitting member. But there was no direct evidence, that the two persons voting, who were alleged not to be entitled to vote in Pelham, for want of residence, voted in the election at all; and no evidence whatever, that if they did vote, they voted for the sitting member.

The committee reported, merely, that they had attended to the subject, and the member returned was entitled to his seat. The report was agreed to.

[Setting aside the allegation that two illegal votes were given in, of which there seems to have been no competent evidence; and assuming that the receiving of votes after closing the poll, however irregular, would not invalidate the election, unless the votes, so received, if counted, would affect the result of the election, as declared; the inquiry would then be, whether the three votes in question would have any such effect. If one of them only was for the sitting member, and the two others for another candidate, and the whole were rejected, the former would still be elected by a majority of two votes; if two of them were for the sitting member, and one only for another candidate, the residue of the votes would be equally divided, and there would be no choice. The evidence leaving it uncertain, whether the sitting member received one only or two of these three votes, the committee were probably not satisfied, that the receiving of them would affect the result, and therefore had no alternative but to confirm the election.]

1830—1831.

COMMITTEE ON ELECTIONS.

Messrs. *Elisha Hubbard, Jr.*, of Williamsburg, *Charles Russell*, of Princeton, *John P. Bigelow*, of Boston, *Solon Whiting*, of Lancaster, *George W. Gardner*, of Nantucket.

NORTH BRIDGEWATER.

THE election of John Goldsbury, returned a member from the town of North Bridgewater, was controverted by Thomas Wales and others, on the ground, that two persons voted in the election, who had not been resident within the said town for six calendar months next preceding, and also, that said Goldsbury did not possess sufficient estate to render him eligible as a representative; in relation to which latter point, the petitioners alleged, that the said Goldsbury had, within eight months, declared to one of the assessors of the said town, that he was not seized or possessed of any ratable estate.

The committee on elections reported, at the January session, that no evidence whatever had been produced by the petitioners against the election or qualifications of Mr. Goldsbury, and therefore that he was entitled to his seat. The report was agreed to.[1]

ASHBURNHAM.

A motion being made in town-meeting not to send a representative, and declared to be decided in the affirmative, the vote was doubted, and the selectmen proceeded to make it certain by polling the meeting, and thereupon declared that the motion was decided in the negative. It was held not to be necessary for the selectmen, after this declaration, to call the list and check the names of those who voted on the question, though they were requested so to do; especially as such had not been the practice.

THE election of Nathaniel Pierce, returned a member from the town of Ashburnham, was controverted by Timothy Stearns and others, for reasons which are fully stated in the following report, made thereon at the January session, by the committee on elections:—

"The objections stated in said petition, against the election of the sitting member, are, that, at the meeting in said town,

[1] 51 J. H. 27, 79, 145, 152.

for the choice of a representative, on the third day of May last, a motion was made, and put, not to send; that the vote was sixty-seven for, and seventy-three or four against sending; notwithstanding which, the chairman of the board of selectmen, by a mistaken count, and counting some twice, declared that it was a vote to send; and that the chairman, though thereto urged, refused to make the vote certain, by calling the list of voters and checking the names of those who voted.

The committee find, by an examination of the testimony of the parties produced in the case, that, after the meeting was opened, and a few votes given for a representative, the motion not to send was made, and those who had voted withdrew their votes from the box. The motion was then put, and the vote declared in the affirmative, which being doubted, the meeting was divided, and the electors were directed by the chairman to pass in front of him; first those in favor of the motion, and then those against it. The electors did pass as directed, and the chairman made declaration that the motion was negatived.

The committee further find, that the chairman was requested, after counting the votes for and against said motion, and declaration of the result, upon the division of the meeting before named, to call the list of voters, and check the names of those who voted, which the chairman declined doing, observing, that, as reasonable men, they ought to be satisfied; and that it is not practised in said town, so to call the list of voters, upon a division of the meeting, and has not been practised for more than twenty years.

And furthermore, that the statements of those, who testify as to the number of persons who voted for and against the motion not to send, are, for the most part, without agreement and contradictory to each other, though they testify, that they were so situated, that they were not mistaken in their count.

The committee, from their examination of the facts testified to, do not find that the selectmen, presiding in said meeting, departed from their duty, or were mistaken in their declaration of the result of the vote, on said motion; or that any of the

electors were counted twice; and are therefore of opinion, that the said Nathaniel Pierce was duly elected, and entitled to his seat. All which is respectfully submitted." The report was agreed to.[1]

TYRINGHAM.

Where illegal votes cast at an election do not change or prevent a majority, the election is not, for that cause, void.

A meeting for the choice of representatives being opened at half past twelve M. and kept open until three P. M., in a town entitled to but one representative; it was held, that the poll was not unreasonably closed.

The election of Egbert B. Garfield, returned a member from the town of Tyringham, was controverted by Bidwell Brewer and others, on the following grounds, viz: that the meeting for the choice of a representative was not legally notified; that one person was admitted to vote, who was not qualified as to residence; and that the meeting was called at an unusual hour, and the poll prematurely closed.

The committee on elections made the following report, in this case, which was agreed to[2]:—

"A meeting was holden in said town, on the third day of May last, for the choice of a representative to the present general court. The number of votes given in at said election was one hundred and one, and Egbert B. Garfield, the member returned from said town, had fifty-six votes, and was declared elected.

The causes stated by the petitioners, against the election of the sitting member, are; first, that the constable posted up but one notification of the meeting, and that in a remote part of the town; when by a vote of the town, passed 1805, it is made the duty of the constable, for all meetings, to post up four notifications, one at each meeting-house, and one other, in each part of the town, at the most public places, in the estimation of the constable, eight days previous to the meeting; secondly,

[1] 51 J. H. 39, 79, 188, 193. [2] Same, 146, 169, 176.

that Henry Turrell was permitted by the selectmen to vote, who had not resided in said town six calendar months next preceding the election; and thirdly, that the meeting was called at an unusual hour, and the poll closed so soon, that those electors, who came at the usual hour, were deprived of the privilege of voting.

The committee find, that four notifications were put up at the places and in the manner prescribed by the vote of the town; and also that Henry Turrell did vote in said election, and for Egbert B. Garfield, the member returned from said town, and that he came to reside in said Tyringham, on the 28th of December, 1829; that the electors were notified to appear on the day above named, at twelve of the clock, M., when the meeting was opened, and adjourned for half an hour, when it was again opened, and continued open, till about three o'clock, P. M., when the poll was closed.

The committee are of opinion, that the poll was kept open a sufficient time for the electors of said town to vote in said election; and as the illegal vote, given by the said Henry Turrell for the sitting member, did not change or prevent a majority, the election is not for that cause void; and therefore the said Egbert B. Garfield is entitled to his seat."

CASE OF WILLIAM B. ADAMS, PETITIONER.

In order to constitute an election, the candidate voted for must receive the votes of a majority of the electors; and where an election is made by a general ticket, each ballot is to be counted as one vote, in determining the whole number of votes, although it do not bear upon it as many names as there are members to be chosen.

The speaker laid before the house, on the second of June, a memorial of William B. Adams, claiming to have been duly elected a member from the town of Marblehead, and praying that the case presented by him, in the said memorial, might be taken into consideration.[1]

The memorial was referred to the committee on elections

[1] 51 J. H. 47, 80.

who reported thereon,[1] at the January session, as follows, namely:—

"A meting was holden in said town on the tenth day of May last, for the choice of five representatives; the poll to be kept open until three of the clock, P. M., at which time the poll was closed. The votes were then sorted and counted, by the selectmen presiding at said meeting, and the whole number declared to be 215; necessary for a choice, 108; and that only two of the persons voted for, were declared elected, to wit: Joseph Green and Philip Besom. The meeting was then dissolved.

The committee find that 215 electors voted in said election, and that the sum of all the names borne on their votes, was 944; consequently, 53 of said electors voted for a less number than five representatives. The memorialist contends, that the rule, which the selectmen ought to have adopted, to ascertain the number of votes, given in at said election, was, to add together the names borne on each vote, the amount of which is 944, and that sum divided by five, the number of representatives voted for, the quotient, 188 4-5, would be the number of votes given in at said election; or, secondly, that only those votes should have been counted, which contained the full number of five names, which, by computation, could not exceed 162, which would reduce the majority to 82.

By either of the latter modes, the memorialist, having 103 votes, would have been elected.

But the committee, after having carefully examined the subject, and the precedents of this house, in similar cases, are unanimously of the opinion, that, to entitle the memorialist to a seat, he must receive a majority of the votes of the electors who voted in said election, which is 108, and that the said William B. Adams received but 103 votes, and therefore was not chosen a representative of said town."

The report was agreed to.[2]

[1] 51 J. H. 169. [2] Same, 176.

1831.

COMMITTEE ON ELECTIONS.

Messrs. *Warren Lovering*, of Medway, *William B. Adams*, of Marblehead, *Joseph T. Buckingham*, of Boston, *Nathan Lazell*, of Bridgewater, *John Wade*, of Woburn.

PHILLIPSTON.

Where a meeting for the choice of a representative, in a town entitled to one member, was opened punctually at the time stated in the warrant, and the poll was kept open from twelve to twenty minutes, and until all persons present, having a right to vote, and desirous of doing so, had voted; it was held, that the poll was not unreasonably closed, although several persons, who had lingered outside of the place of meeting, in the expectation that it would not be opened until from one quarter to three quarters of an hour later, which was the most usual time, were thereby prevented from voting.

The election of Abel White, returned a member from the town of Phillipston, was controverted by Elijah Gould and others, on the ground, that, at the meeting for the choice of a representative in said town, the poll was not kept open a reasonable and proper time.[1]

On the tenth of June, the committee on elections made the following report,[2] in this case :—

"They have examined the depositions, furnished by the petitioners, in support of their allegations, and heard the answer of the sitting member thereto, and are of opinion, that, although all the usual facilities for an exercise of the elective franchise, by all the citizens of that town, at the late representative election, were not afforded by the selectmen, in consequence of which, many of the legal voters did not exercise the right of voting, who had intended to do so; yet there does

[1] 52 J. H. 57. [2] Same, 118.

not appear to be any such infringement of personal rights, in this respect, as would require the interference of the house. The committee therefore report, that Abel White is entitled to a seat."

The report was re-committed, with instructions to the committee to report the facts.

On the thirteenth, the committee reported a statement of facts, as follows:—

"The meeting of the inhabitants of the town of Phillipston, for the choice of a representative in this legislature, was regularly warned and held in said town, on the eleventh day of May last, at two o'clock, P. M.; the poll for such choice was declared open by the selectmen, within a few minutes of that hour, and was kept open from twelve to twenty minutes, and until all persons in the meeting-house, having a right to vote, and desirous of exercising that right, had voted; the poll was then closed, (previous notice thereof having been given by the board of selectmen,) the votes counted, and a record thereof made, by which it appeared that thirty-three votes had been cast, all of which were for Mr. White.

It further appeared, that the usual time, for opening meetings in said town, had been at from one quarter to three quarters of an hour after that named in the warrant for holding such meeting; but the practice in this respect had not been uniform; that on this occasion, a considerable number of the inhabitants, who had come to vote in the representative election, had lingered at an adjacent public house, while it was pending, until informed that the poll was closed, and Mr. White elected, in expectation that the opening of the meeting, and closing of the poll, would be delayed as usual; and that, on learning that the poll was closed, several persons, having a right to vote, immediately went to the meeting-house, demanded the privilege of voting, and were refused by the selectmen. The number who thus lost their privilege did not appear to the committee; but on a subsequent ballot, taken on the proposed amendment to the constitution, seventy-one votes were cast, as appears by reference to the return of that town

in the secretary's office. Among those, who were thus prevented from voting, were two of the board of selectmen, who subsequently signed Mr. White's certificate of election.

The sitting member alleges, that notice had been given by the selectmen, that this meeting would be opened punctually at the hour named in the warrant; but it does not appear to have been given at any public meeting of the inhabitants, or to have been generally circulated.

It did not appear, that any opposing candidate to Mr. White would have been voted for, if the poll had been kept open for any longer period. Mr. White is chairman of the board of selectmen in the town of Phillipston, and the petitioners allege, that said board contains also two of his near relatives.

The above are all the facts which can have any bearing on the decision of the house."

Upon these facts, the first report, declaring Mr. White to be entitled to his seat, was agreed to.[1]

Note. By the adoption of the tenth article of amendment to the constitution, the political year 1831 terminated on the Tuesday next preceding the first Wednesday of January, 1832. The amendment provided that the political year should thereafter commence on the first Wednesday of January, instead of the last Wednesday of May, and that the general court should assemble every year on the first Wednesday of January, and should proceed, at that session, to make all the elections and do all the other acts, which, by the constitution, are required to be made and done at the session which had previously commenced on the last Wednesday of May. Before the adoption of the amendment, it had been customary for the legislature to have two sessions a year, the first commencing on the last Wednesday of May, as required by the constitution, and the other held by adjournment on the first Wednesday of January

[1] 52 J. H. 124, 178, 183.

following. Since the adoption of the amendment, with two or three exceptions, there has been but one session a year, commencing with the political year on the first Wednesday of January. In the year 1835, and again in 1842, there was a second session.

1832.

COMMITTEE ON ELECTIONS.

Messrs. *John Keyes*, of Concord, *John P. Bigelow*, of Boston, *Charles Hudson*, of Westminster, *Samuel J. Gardner*, of Roxbury, *Samuel Merrill*, of Andover.

EAST BRIDGEWATER.

Where a meeting was held on the second Monday of November, for the choice of representative, &c., at which meeting, it was voted not to send, and then the meeting was dissolved; and the selectmen, at the written request of the requisite number of the freeholders, called another meeting for the choice of representatives, on the fourth Monday of November, at which meeting an election was effected; it was held, that, by the proceedings of the first, and the request for the calling of a second meeting, such a second meeting was made "necessary for the choice of representatives," within the meaning of the tenth article of the amendments to the constitution.

The election of Azor Harris and Joseph Chamberlin, Jr., members returned from the town of East Bridgewater, was controverted by Hector Orr and others, on the ground, that, after a meeting had been duly held in said town, at which it was voted not to send a representative, and the meeting had been dissolved, a second meeting was called, at which the members returned were elected.[1]

[1] 53 J. H. 16, 46.

The committee on elections reported, in this case, as follows:—

"A town-meeting was duly holden in said town, for the choice of representatives, on the fourteenth day of November last past, being the second Monday of said month; at which meeting, on the question whether the town should be represented the present year, the same was decided in the affirmative; on the question whether the town should send two representatives, the same was decided in the negative; and on the question whether the town would send one representative, that also was decided in the negative. A motion then prevailed to dissolve the meeting, and it was dissolved accordingly On this day, no balloting whatever for representatives took place.

Afterwards, at the written request of more than ten of the freeholders in said town, the selectmen thereof issued their warrant, and called another meeting of the inhabitants, on the twenty-eighth day of November, being the fourth Monday of said month, for the choice of representatives, at which last meeting, the said Azor Harris and Joseph Chamberlin, Jr. were chosen to represent said town in the present general court. No objection is made to the manner or the warning of this last meeting. But the petitioners object, and say, that the last meeting was not agreeable to the constitution, and was illegal. The constitution provides, that 'the meeting, for the choice of governor, lieutenant-governor, senators, and representatives, shall be held on the second Monday of November, in every year, but meetings may be adjourned, if necessary, for the choice of representatives, to the next day, and again to the next succeeding day, but no further. But in case a second meeting shall be necessary for the choice of representatives, such meeting shall be held on the fourth Monday of the same month of November.'

Upon these facts, the committee have come to the conclusion, that the second meeting was rightly held, and that Azor Harris, and Joseph Chamberlin, Jr., were elected representa-

tives of said town, agreeably to the provisions of the constitution, and are entitled to their seats."

The report was agreed to.[1]

GILL.

[See the introductory note to the next preceding case.]

THE election of Josiah Pomroy, returned a member from the town of Gill, was controverted by Benjamin Brainard and others, for the reason stated in the case of East Bridgewater abovementioned. The committee on elections made a report thereon as follows:—

"A meeting for the choice of representatives was duly holden in said town, on the second Monday of November last, at which meeting, after a number of unsuccessful ballotings for a representative, the town voted not to be represented. Afterwards another meeting was warned, and held on the fourth Monday of said month of November, at which last meeting Mr. Pomroy was chosen.

The committee are of opinion, that the second meeting was constitutional, and that said Pomroy is entitled to a seat."

The report was agreed to.[2]

[The only difference, between this and the East Bridgewater case, is, that in this it does not appear whether the selectmen called the second meeting of their own authority, or, at the request of ten or more of the freeholders, as in that case.]

[1] 53 J. H. 118, 161. [2] Same, 125, 167.

SHREWSBURY.

The rejection of the vote of a qualified voter, whose name was not on the list, when tendered in the balloting for state and county officers, is no objection to the election of a representative, made subsequently, in which such voter did not tender his vote, although all the elections were made at the same meeting, and the same list of voters was used.

The rejection of a legal vote will not invalidate an election, unless the majority would have been changed or prevented by its reception.

The election of Nymphas Pratt, returned a member from the town of Shrewsbury, was controverted by Josiah Norcross and others, for the following reasons: 1. That at the meeting for the choice of a representative, in said town, the votes of Norcross, and one Maynard, who would have voted against the said Pratt, were improperly rejected; and 2. That Eddy Tucker, one of the voters, having accidentally dropped his vote, before putting it into the ballot box, the presiding selectman, (Mr. Pratt, the member,) picked up a different vote, having his own name on it, and put it into the box, as and for the vote of said Tucker.[1]

The committee on elections made the following report, in this case, which was agreed to[2]: —

"A town-meeting was duly held in said town, for the election of a representative to the general court, on the fourteenth day of November last, being the second Monday of said month, at which meeting, the said Nymphas Pratt, being chairman of the selectmen, presided. The whole number of votes given in was two hundred and five, of which the said Pratt had one hundred and four, the rest being distributed among a number of candidates.

It appeared to the committee, that, at a meeting of the selectmen, duly held during the hour previous to the town-meeting, it was agreed by them, that Josiah Norcross and all others, who should come forward in the meeting-house, at the election, and satisfy the selectmen, that they possessed the requisite legal qualifications to vote, should then have their

[1] 53 J. H. 50. [2] Same, 318, 398.

names inserted on the list, if they should request it. It further appeared, that the said Josiah Norcross, while the town clerk was calling the list of voters the second time, and after he had passed the letter N, offered his ballot for state and county officers, to the chairman of the selectmen. The chairman refused his ballot, at the same time turning to the town clerk and saying, that Josiah Norcross wished to vote, to which the clerk replied, that he could not attend to it then, as his name was not on the list, but would, when he had finished calling. After the list had been called over the second time, a loud proclamation was made by the chairman, that all who had a right to vote, might now have an opportunity. None, however, then offered to vote. There was no evidence, that Norcross desired that his name should be inserted on the list. On the balloting for representatives to the general court, Norcross did not offer to vote, but it was testified by him, that, had he voted, he would have voted for Thomas Harrington, Jr. It was admitted, that the said Norcross possessed the constitutional qualifications to vote for representatives to the general court.

On this evidence, the committee are of opinion, that the rejection of the vote of Josiah Norcross, in the election of governor, lieutenant governor, and senators, is not a valid objection against the election of Nymphas Pratt, because, no vote of Norcross was tendered in the election of a representative; and because, if it had been tendered and rejected, Mr. Pratt would still have had a majority of the votes given in. And besides, the name of the said Norcross was not upon the list.

But the petitioners further object to the election of Mr. Pratt, because he improperly put into the ballot box a vote for himself, under color of receiving the vote of one Eddy Tucker. Mr. Tucker was a legal voter, and accidentally dropped his vote, in attempting to put it into the box. Mr. Pratt took up a vote from the place where Mr. Tucker's vote appeared to fall, and holding it up, and inquiring of the said Tucker, 'if this was not his vote,' and saying, 'this must be the vote,' put it into the box. One witness testified in one deposition, that

he saw on the ballot, thus put in by Mr. Pratt, the letter 'N,' and the word 'Pratt;' and in another deposition, the same deponent adds, that he thinks it bore the name of 'Nymphas.' The said Tucker himself testified in one deposition, that he assented to the act of the said Pratt, in putting into the box the abovementioned vote, and in another deposition he swears that he neither assented, nor objected to it, and that he did not know, whether the said vote was his or not. He further says, that his ballot bore the name of Thomas Harrington, Jr.

The testimony of another witness, Calvin H. Stone, was, that the vote of the said Tucker was dropped in the direction of the town clerk's desk, that the chairman followed it with his hand, took up. one from the desk, and looking at said Tucker, and bowing, deposited it in the box, Mr. Tucker appearing to consent.

The only additional evidence, relative to this part of the case, was the deposition of Henry Snow, the town clerk, and one of the candidates for representative. He deposed, that he wrote but two votes on the day of election, and they were both for Nathan Pratt; one of which he put into the box, the other he left in the corner of his writing desk, on which he saw no other vote during the day. A few minutes after he had voted, he heard some one say, 'you have dropped your vote,' to which, another, he did not know who, replied, 'I thought it dropped in.' The chairman then looked over the table for it, and the deponent saw the hand of the chairman having a vote therein, moving from the deponent's writing desk towards the ballot box; the chairman then looking at some person unknown to the witness, said, 'yes, I presume this is your vote,' and dropped the ballot into the box. The deponent further says, that he did not afterwards see the vote for Nathan Pratt on his desk. He further testifies, that on counting the votes for representative, he saw among them two votes for Nathan Pratt, in his own hand writing, and they were the only ones counted for that candidate, though Luke Harrington deposed, that he also voted for Nathan Pratt.

The committee, on this evidence, believe that the vote put

in by the chairman, as and for the vote of Eddy Tucker, was not for himself, but that it bore the name of Nathan Pratt, and so would not affect the majority of the sitting member; and, that even on the supposition, that it bore the name of Nymphas Pratt, the sitting member would still be chosen by a majority of votes. If any mistake actually occurred, with regard to the vote of Mr. Tucker, the committee have seen no reason whatever, to suppose that it was intentional on the part of Mr. Pratt.

On the whole, the petitioners must establish both a wrongful rejection of the vote of Josiah Norcross, and a wrongful admission by the chairman of a vote for himself, before they can prevail; and as the committee think, that so far from substantiating both of these positions, the petitioners have failed in both, they are of opinion, that Nymphas Pratt was duly elected a member of this house, and is entitled to his seat."

WEST SPRINGFIELD.

At a meeting for the choice of representatives, it was voted to send four, and to elect them by separate ballotings. After two had been chosen, a motion to adjourn was made, seconded, put to vote, and declared to have been decided in the negative. The vote being doubted, the question was again put and declared in the negative. The vote was then doubted by more than seven voters, who demanded a division. At this time there was great confusion in the hall, and the division was refused by the selectmen, on the ground, that the same persons who asked it had refused to take the required and proper measures to be counted on a previous division at the same meeting. A large number of voters then withdrew, and two representatives were chosen by a smaller number of votes than had been necessary to a choice at either of the previous ballotings. It was held, by the committee on elections, and so reported by them, that the election of these two was void; but the report was rejected by the house.

The election of Warren Chapin and Henry Phelon, two of the four members returned from the town of West Springfield, was controverted by Heman Day and others, for the following reasons alleged in their remonstrance: 1. That the presiding officer, after two representatives had been chosen, refused to "make certain" the vote of the meeting upon a motion to

adjourn, the vote having been declared to be in the negative, and being doubted by more than seven of the legal voters; and 2. That the presiding officer also refused to put a motion, to reconsider the vote to send four representatives, which had been previously passed.[1]

The committee on elections reported as follows[2]:—

"A meeting was duly holden in said town, on the fourteenth day of November last, for the choice of representatives. A motion was regularly made, that said meeting should choose one representative, which was decided in the negative. A motion was then made to choose four representatives; this motion was put, and it was declared to be a vote. This decision was doubted, and a division was called for, and the selectmen requested those opposed to the motion to leave the hall in which the meeting was held, and arrange themselves so as to be counted; this was done, and then those in favor of the motion were requested to leave in like manner, and be counted; this being done, the chairman of the selectmen declared, that a majority was in favor of the motion. The majority on this last motion is stated to have been about thirty. It appeared that the hall, in which said meeting was holden, was so filled with people that it would have been somewhat difficult to have polled the voters therein. After this decision, a motion was duly made, to elect the four representatives on one ticket. This motion was put, and it was declared to be a vote. This decision was doubted, and a division was called for, and the selectmen requested the meeting to divide as on the motion to send four representatives, in order to be counted, and those opposed to the motion on being requested to leave the hall, refused to go, and no count took place. They did not offer to be counted in the hall, and no reason was assigned for the refusal. This last motion was then withdrawn, and a motion prevailed to elect one representative at a time. The meeting then proceeded, and elected two representatives. The presiding officer then called upon the electors, to bring in their votes for the third representative, but before any votes for the

[1] 53 J. H. 45, 53. [2] Same, 225.

third representative were deposited in the ballot box, a motion was regularly made and seconded to adjourn the meeting; at which time, it appeared, that it was nearly sunset. This motion was put, and the presiding officer declared it not a vote to adjourn. This decision was doubted, those of a contrary mind were then called for, and it was again declared not to be a vote. It was still doubted, and the presiding officer again propounded the question, and put the motion, and again declared it not a vote to adjourn. This decision was immediately doubted by more than seven of the voters, and a division was called for by them. The presiding officer said he had decided that it was not a vote to adjourn the meeting, and the town had already decided to send four representatives, and he called upon the meeting to bring in their votes for a third representative. At this time, it appeared that there was much noise and clamor in the hall, some alleging that it was a vote to adjourn, and others that it was not, and some insisted on a division, that the vote might be made certain. The presiding officer said he had requested a division before, and there was a refusal, and there would be again, if he requested it, and called again for the votes for a third representative. Upon this a large number of voters withdrew from the meeting, some protesting against the proceedings, and declaring, that if the meeting proceeded any further, their doings would be illegal and void. Those who remained there carried in their votes, and the said Chapin and Phelon were declared elected representatives. It appeared, that the number of votes, given in for said Chapin and Phelon, was less than the number necessary to a choice in the election of either of the two first chosen; and that nearly all that were cast, when said Chapin and Phelon were severally elected, were for them. It further appeared, that some, who doubted the vote to choose the four on one ticket, and who refused to leave the hall to be counted, were active in doubting the decision on the motion to adjourn. It did not appear that said Chapin and Phelon were present at said meeting. There was evidence tending to show, that a majority of said meeting was against the motion to adjourn.

The committee after a full investigation of this case are of opinion, that it was the duty of the selectmen, as presiding officers of the meeting, to have made certain the vote on the motion to adjourn by polling the voters, inasmuch as it was doubted by more than seven, and as the meeting did not decide upon any other mode to determine the question; that it was not for the chairman of the selectmen to determine it in the manner he did; and although he might fully believe, that there was a majority against the motion to adjourn, he had no right, under the circumstances of the case, however fair and honest might be his views, to adhere to his decision, without polling the voters, and settling the question in that way. In this view of the case, the committee cannot come to any other conclusion than that the proceedings of the meeting, so far as they relate to the election of said Chapin and Phelon were illegal and void, and that said Chapin and Phelon are not entitled to seats in this house."

The consideration of this report, without much debate, was indefinitely postponed.[1]

BRIDGEWATER.

[The election in this town was controverted on the ground, that the member returned had not estate sufficient to render him eligible as a representative.[2] The committee reported in favor of the election, and their report was agreed to.[3] It decides no principle, which requires to be stated.]

LYNN.

If the proceedings at an election are conducted in a loose and improper manner, and in a way to open a door for fraud and collusion; yet if no fraud or collusion is proved to have been practised, the election will not be void.

The election of William B. Breed, Jonathan Buffum, Joseph Currier, Jacob Ingalls, Francis S. Newhall, Eleazer C. Rich-

[1] 53 J. H. 316. [2] Same, 82. [3] Same, 145, 152.

ardson, and Stephen Oliver, members returned from the town of Lynn, was controverted by James Gardner, and others, on the ground of improper conduct on the part of the selectmen, who presided in the meeting, at which the said members were elected.[1]

The facts in the case are stated at length, in the following report[2] of the committee on elections:—

"A meeting of the inhabitants of said town was holden, for the choice of representatives, on the second Monday of November last; and previous to said meeting, the selectmen had caused to be prepared and posted up an alphabetical list of the voters in said town, and gave written notice, which was posted with the list, that a meeting of the selectmen would be holden on Saturday previous to the day of election, from two to four o'clock, P. M., for the purpose of correcting the list. It appeared that two of the selectmen, there being but three in said town, did meet in pursuance of such notice, but no person appeared before the selectmen for the purpose of showing his right to vote, and procuring an insertion of his name on the list. It also appeared, that the two selectmen, the other being sick and unable to attend to his duty, held another meeting on the day of election, from nine to ten o'clock, A. M., for the purpose of receiving evidence of the qualifications of such as claimed a right to vote in the election. This last meeting was duly notified. At this meeting, a number of persons applied, and claimed the right to vote. A hearing was given to such as applied, and a supplemental list was made out, which was not in alphabetical order.

The meeting, on the day of election, was opened at ten o'clock, A. M.; and notice was given, when the meeting was called, that the poll would close at three o'clock, P. M. The voters carried in their ballots for governor, lieutenant-governor, senators, and representatives, on one ticket. The selectmen, when the poll was opened, called upon six or seven persons to check the list, when the voters should give in their votes. Two of the sitting members, namely: Stephen Oliver, and

[1] 53 J. H. 44, 53. [2] Same, 167.

Francis C. Newhall, were employed for that purpose. It also appeared, that some names were added to the list after the poll was opened, and one by said Oliver, by order of the selectmen, and that such as were added voted in the election.

It further appeared, that one person voted in the election, but not for the sitting members, whose name was not on either of the lists; that two others applied to have their names inserted, and to vote, but were refused the right to vote, solely on the ground, that their names were not on the list, the selectmen assigning, as a reason, that they had but one rule on that subject. It further appeared, that the town clerk, who was not one of the selectmen, sorted some of the votes before the poll was closed; that Jacob Ingalls, one of the selectmen, and one of the sitting members, also counted a part of the votes before the poll was closed, and having given the number to the other selectman, who presided with him at the meeting, threw the votes, so counted by him, under the table. It further appeared, that William B. Breed, another of the sitting members, and not being selectman, was at the ballot box before the poll was closed, handling the votes; and said Breed, and two others, not sitting members, cut and severed the ballots, that did not contain the names of those they called the regular candidates, of the three parties, at the election. It further appeared, that these votes were counted, after they had been severed, and that the persons employed as checkers, and those who lent their aid to cut the ballots, belonged to different parties in the town.

It further appeared, that the selectmen received the ballots from the voters into their hands; and these said selectmen deposited the ballots in the box, and that such had been the usage in that town; that the selectmen found two double ballots, and threw away one of each, without counting those so thrown away, and these were for the sitting members.

It further appeared, that the two selectmen who presided at the meeting counted the votes separately, and gave the number of their respective counts to the town clerk. It did not appear, by the records of the town, that the selectmen had

taken the oath prescribed by law in relation to elections, but it did appear, by the testimony of the town clerk of said town, that they had taken said oath.

A copy of the record of all the votes, given in on the day of election, in said town, accompanies this report.

The committee have given to this case a patient and long hearing, and have endeavored to present the facts that appeared to them material to a just decision. The committee are fully satisfied, that the sitting members received a majority of the votes given in at the election. And, although they cannot but feel sensible that the meeting was conducted in a loose and improper manner, and in a way that has a tendency to open a wide door for fraud and collusion in elections, yet, inasmuch as no fraud or collusion was proved to have been practised in this election, the committee have come unanimously to the conclusion, upon a view of the whole case, that the election of said Breed, Buffum, Currier, Ingalls, Newhall, Oliver and Richardson is valid, and that they are entitled to hold their seats."

The report was agreed to.[1]

[1] 53 J. H. 246.

Opinion of the Justices of the Supreme Judicial Court on the question, whether persons, whose taxes are abated, or who are exempted from taxation, on account of age, infirmity, or poverty, are citizens exempted by law from taxation, within the meaning of the third article of the amendments to the constitution.

The word "paupers" has acquired a precise and technical meaning, and is understood to designate persons receiving aid and assistance from the public, under the provisions made by law for the support and maintenance of the poor.

Persons whose taxes, "by reason of age, infirmity, or poverty," are abated, or who, for those reasons, are omitted to be taxed, by the assessors, are not "citizens exempted by law from taxation," within the intention of the 3d article of the amendments to the constitution; and, therefore, are not entitled to vote without paying taxes.

Assessors have no authority, under the tax acts, arbitrarily to exclude aged and poor persons from the right of voting, by an omission or abatement of their taxes. Such omission or abatement must be with the consent, expressed or implied, of the person who is omitted to be taxed, or whose tax is abated.

If such persons have, in fact, paid no tax, assessed within two years next preceding any election, they are not entitled to vote therein, though such non-payment is occasioned by an exemption or abatement, under the discretionary authority of the assessors.

But if they have paid any tax, assessed within two years previous, they are entitled to vote in any election for governor, lieutenant-governor, senators, and representatives.

In the senate, on the eighth of February, 1832, it was

Ordered, That the justices of the supreme judicial court be requested, as soon as may be convenient, to give their opinion on the following question:—

Whether those persons, who are exempted from taxation by town assessors, under the authority given them in the following clause in the usual tax acts of the commonwealth:—"And if there be any persons, who, by reason of age, infirmity, or poverty, may be unable to contribute towards the public charges, in the judgment of the said assessors, respectively, they may exempt the polls and estates of such persons, or abate any part of what they are assessed, as the said assessors may deem just and equitable,"—and who have the requisite qualifications as to age and residence, are entitled to vote for

governor, lieutenant-governor, senators, and representatives, under the third article of the amendments to the constitution.

On the thirteenth, the following opinion of a majority of the court, (Mr. Justice Morton being absent) was received by the president, and by him laid before the senate :—

" The third article of the amendments to the constitution of the commonwealth, upon which the question arises, is as follows, viz :—Every male citizen of twenty-one years of age and upwards, (excepting paupers, and persons under guardianship) who shall have resided within the commonwealth one year, and within the town or district, in which he may claim a right to vote, six calendar months, next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid, by himself or his parent, master or guardian, any state or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this commonwealth, and also every citizen who shall be by law exempted from taxation, and who shall be, in all other respects qualified as aforementioned, shall have a right to vote, in such election of governor, lieutenant-governor, senators and representatives; and no other person shall be entitled to vote in such elections.'

This question appears to us to involve three distinct points, on subjects of inquiry arising from as many distinct clauses or provisions of the constitutional article cited.

1. Whether, the persons described, who may be exempted from taxation, or whose taxes, may be abated under the discretionary authority given to the assessors by the tax act, are " paupers" within the meaning of the exception.

2. Whether they are by law exempted from taxation, so as to give them the political privilege of voting without being assessed to any tax.

3. Whether, not being paupers, and being liable to be taxed, or in fact assessed, though such tax be omitted, or abated under the discretionary authority of the assessors, they are to stand upon the same footing in regard to the privilege of

voting as if they had been regularly assessed, and had actually paid a tax.

1. In a certain loose and indefinite sense, the persons in question may be called paupers. The case supposes them to be poor, and in consequence thereof, to be unable to contribute towards the public charges. But we are of opinion, that this is not the sense in which the word is intended in the constitution. Long before the adoption of the article in question, the word "paupers" had acquired a precise and technical meaning, and was understood to designate persons receiving aid and assistance from the public, under the provisions made by law for the support and maintenance of the poor. Such provisions had been made, both in England and in this country, long before the adoption of this article, or of the original constitution. Besides, if it were intended to be understood in a more general sense, and as extending to all poor persons, it might go to exclude those from voting, whose poverty might be manifested in other modes than the one set forth in the extract from the tax act. Considering how important it has always been regarded in the framing of fundamental laws, upon which the essential civil and political rights and privileges of the subject mainly depend, that words should be used in a sense as exact and definite as the nature of language will permit, and how careful the framers of our constitution have been in the observance of this rule; and considering upon how indefinite and uncertain a basis, the important right of voting would have stood, had the word paupers been used in any other than the exact and technical sense which we have ascribed to it, our opinion is confirmed, that it was intended to be confined to persons claiming assistance for themselves or families, from the provision made by law for the poor.

2. The next inquiry is, whether the persons described can be considered as persons exempted by law from taxation, within the meaning of the constitutional provision in question.

Here, as in the other case, in a certain loose sense, they may be said to be exempted by law, because the authority is given by law to the assessors, and when executed, it is by force of

the law, that the exemption takes effect. But we are of opinion, that this is not the true construction of the clause, but that it means to designate those persons, who, by the terms of the act itself, are exempted, and where nothing more is necessary to give effect to the exemption, than for the person entitled to the benefit of it, to show that he comes within its terms.

Whether we regard the terms of the law imposing the tax, or the probable and obvious intent and design of the constitution, we think there will be discovered a broad and well defined distinction, between those exempted from taxation, by law, and those exempted, by reason of poverty and inability, under the discretionary authority given to assessors.

It had long been the practice in this commonwealth, in the assessment of taxes, to exempt certain persons, in terms, whose pursuits and employments were devoted to the public service, and who, in effect, must be supported at the public charge, such as settled ministers, officers and professors of colleges, preceptors and masters of public schools and academies. These persons were exempted, not on the ground of inability to contribute to the public charges, but because, as they labor wholly or chiefly, for the public, and are entitled to a support from the public, the exemption from taxation is only one means of contributing to their support; and, if they were held liable to pay any tax, their compensation for services ought justly to be enlarged in the same proportion, out of some other public fund. Such persons therefore do, in effect, contribute their share to the public charges; though they do it by their services, instead of a money rate.

In the tax acts, containing the clause recited in the order of the honorable senate, the act first provides for the absolute exemption of ministers of the gospel, the president and professors of colleges, and others specially enumerated, and then, in the same section, proceeds to vest a discretionary authority in the assessors, to exempt those, who, through age, infirmity or poverty may be unable to contribute. Thus the act makes a strong and marked distinction between the two classes of per-

sons. The same conclusion results from the constitutional article in question, which puts those who are exempted by law exactly upon the same footing with those who actually pay taxes, in regard to the privilege of voting. We think this provision manifestly had reference to the old and uniform practice of exempting these classes of public servants from taxation, upon the grounds above stated, that these were the persons designated by the description "citizens exempted by law from taxation," and that it can by no reasonable construction extend to those, who, at the discretion of the assessors, may be exempted on account of poverty or inability.

3. The remaining inquiry is, whether persons thus liable to be assessed, though in fact exempted, by the assessors, are entitled to the privileges of voters.

We are of opinion, that when such exemption has extended to two years they are not. We think it was the plain intent of this clause of the amendment of the constitution, to give practical force and effect to the maxim, that taxation and representation should go together; and to secure the right of electing those, who are to administer the government, to those who in fact contribute to its support. It confines the power therefore, in terms, to those who shall have paid some tax assessed within a short period preceding the election and for the sake of exactness fixes that period at two years. If therefore the persons in question have been exempted, for two entire years, either by being omitted in the assessment, or by the abatement of the tax, by the assessors, such persons are excluded by the plain terms and manifest intent of the constitution. But if such exemption has not extended to two years, and if the persons in question have paid any tax assessed within two years, although exempted the last year, such persons have a right to vote, coming within the terms of the constitution, and not being excepted as paupers.

It may be objected to this construction, that, consistently with it, aged and poor persons may be arbitrarily excluded from the right of voting, by the assessors, by the omission or abatement of their taxes.

But we think the tax act will not justly admit of this construction. It must be considered, that the liability to taxation, and the political privilege of voting, consequent thereon, are established by different acts, at distant periods, and having distinct objects in view. Each must be construed by itself. The purpose of the tax act is revenue; it is to lay a burthen and charge upon the persons and property of the people, to provide funds for public objects. The privilege of voting, consequent thereon, is incidental and collateral, established by a distinct constitutional provision, and is not to be regarded as one of the purposes and designed effects of the act. Such effect, therefore, cannot be much regarded in its construction. The direct object of the act being to raise a revenue, by laying a tax and burthen upon the people, an exemption from such burthen must be regarded as a benefit conferred on those entitled to it. It is a general rule of law, that what is intended for one's benefit, he may claim or waive, at his election, and this rule applies with increased force, when other and incidental consequences, important to himself, depend upon such election. So when a grant or bequest is made to one, being apparently for his benefit, he may accept or waive it; this right is of the higher importance, where such grant or bequest is made upon some trust attended with responsibility, or upon other onerous conditions. So we think the exemption in question was intended as a benefit to those who by reason of age, infirmity, or poverty, are unable to contribute, and one which if they so elect, they may waive, and in such case, it would not be in the power of the assessors to omit them in the assessment, or abate their taxes, against their consent, with a view either to affect their elective franchise, or for any other purpose. The language of the act is, that the assessors may exempt; which implies, we think, that it is to be done, with their consent, express or implied. It is true, that the word "may," is sometimes construed as imperative, and equivalent to "shall;" but it is only where the context and general purpose of the act or instrument manifestly require it. Here we think the context and general objects of the act require a dif-

ferent construction, and imply that the word "may" was used in its ordinary sense, as permissive, granting power to the assessors to allow the exemption, at the election of those entitled to the benefit of it.

On the whole, our opinion is, that the persons in question are not excluded from the right of voting as paupers; that they are not entitled to vote, without paying taxes, as citizens exempted by law from taxation; and that if they have actually paid no tax, assessed within two years next preceding such election, though such non-payment was occasioned by an exemption or abatement, under the discretionary authority of the assessors, such persons are not entitled to vote; but that if they have in fact paid any tax assessed within two years previous, they are entitled to vote in any election for governor, lieutenant-governor, senators, and representatives.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE.

February 14, 1832.

1833.

COMMITTEE ON ELECTIONS.

Messrs. *Samuel M. McKay*, of Pittsfield, *Samuel Merrill*, of Andover, *Otis Everett*, of Boston, *George W. Heard*, of Ipswich, *Benjamin Thompson*, of Charlestown.

LYNNFIELD.

Selectmen are not obliged to receive the vote of one, whose name is not on the list, and who does not apply to have it put there, at the time appointed by the selectmen, for the purpose of receiving such application.

THE election of John Upton, Jr., returned a member from the town of Lynnfield, was controverted by Josiah Newhall and others, on the ground, that at the meeting for the choice of a representative in said town, the vote of one person, who was not qualified, was received, and that of another, who was qualified, was rejected.

The following is the report of the committee on elections, in this case:—

"The objections stated in the petition against the sitting member, are:—1. That the vote of Osborn Richardson, who was not a legal voter in said town, was received by the selectmen; 2. That the vote of G. W. Hale, who was a legal voter in said town, was rejected by the selectmen.

It appeared in evidence, as set forth in the petition, that if G. W. Hale had been permitted to vote, there would have been no choice. It did not appear, that the rejection of Richardson's vote would have produced the same effect, as for whom he voted was not proved.

Having maturely considered the testimony, the committee are unanimously of opinion, that Richardson did not, by his absence for about two months, during the year 1832, lose his residence in the town of Lynnfield, and consequently that he was a legal voter in said town, on the second Monday of November last. Also, that the circumstances attending the stay of Hale, in the town of Lynnfield, are not such as to have given him a residence or domicil in said town, and that the selectmen were not obliged to receive the vote of said Hale, he having neglected to make application for the insertion of his name on the list of voters, at the time appointed by the selectmen, in accordance with the requisitions of the

law.[1] The committee are therefore of opinion, that the election is valid, and that John Upton, Jr., returned a member from said town of Lynnfield, is entitled to a seat."

The report was agreed to.[2]

MALDEN.

The number of representatives to which a town might be entitled, before the adoption of the twelfth and thirteenth articles of amendment to the constitution, were to be determined by the number of ratable polls therein on the day of election.

The election of Edward Wade, the last chosen of the three members returned from the town of Malden, was controverted by John Sprague and others, on the ground, that the said town was not entitled, by the number of ratable polls therein, to send three representatives.[3]

The committee on elections reported as follows[4]:—

"It appeared in evidence, and was admitted by the parties, that on the first day of May last, there was not a sufficient number of ratable polls, in the town of Malden, to entitle said town to three members in this house: but, that on the 12th day of November last, there was a sufficient number of ratable polls, in the town of Malden, to entitle said town to three members.

The petitioners contend, that, whereas the meaning of the words 'ratable polls,' in the constitution, must be established and defined by the tax act last passed; and whereas the last tax act passed requires the assessors to make the valuation on all property, as it may be holden or owned, on the first day of May, and to tax all polls, who may be over the age of sixteen years, on the first day of May; that it is not competent for towns to take the ratable polls, as a basis of representation, at any other time, than on the first day of May.

The sitting member contends, that the constitution can only be rationally understood to refer to the number of ratable

[1] See *Bacon* v. *Benchley*, 2 Cush. 100.
[2] 54 J. H. 47, 96, 113. [3] Same, 49. [4] Same, 160.

polls on the day on which the election takes place, and that the tax act is only to be regarded as defining what are the qualifications of a ratable poll, on the day of the election.

This construction of the constitution seems to be recognized by a part of the 7th section of the tax act, last passed, wherein provision is made for the taking of a 'new valuation,' 'at any time of the year' which towns 'may determine to be necessary, at a legal meeting, to be warned for that purpose.'

The committee are of opinion, that the number of representatives is to be determined by the number of ratable polls, on the day of election; and accordingly report, that Edward Wade, the sitting member from the town of Malden, is entitled to a seat."

The report was agreed to.[1]

ADAMS, NORTON.

[The elections in these towns were controverted, but in the first, the committee were discharged, and in the other, the petitioners had leave to withdraw, at their own request.]

[1] 54 J. H. 205.

1834.

COMMITTEE ON ELECTIONS.

Messrs. *Samuel M. M'Kay*, of Pittsfield, *Henry Chapman*, of Greenfield, *Frederick Robinson*, of Marblehead,[2] *Thomas Wetmore*, of Boston, *Charles Bemis*, of Watertown.

[2] During the investigation of the Marblehead election, Mr. Robinson was excused, at his own request, from serving on the committee, and Charles P. Huntington, Esq., of Northampton, appointed to take his place.

MARBLEHEAD.

A neglect of the selectmen, presiding at an election, to call and check the names of the persons voting therein, as required by the statute of 1813, c. 68, § 4, is not sufficient to invalidate the election.

The reception of illegal votes, not sufficient in number to affect the majority, will not invalidate an election.

The election of Ezekiel Darling, James Goodwin, John Quiner, Frederick Robinson, and William Widger, Jr., members returned from Marblehead, was controverted by William Reed and others,[1] for reasons, which are stated in the report of the committee on elections.

The committee reported[2]: —

"That the petitioners allege, first, 'that the selectmen neglected to check the names of persons applying to vote, as the law requires.'

On this allegation, the committee find, that the list of voters was not called and checked, but that it was, in one or more instances, referred to by the selectmen presiding at the election.

The committee are of opinion, that the 4th section of the 'act more effectually to secure the rights of suffrage,' (statute of 1813, c. 68,) invests the presiding officers at elections, with power to call and check the lists of voters, in cases where they may deem it necessary, but that it is not imperative upon such officers to do so, in cases where they may know the voter, and be satisfied as to his qualifications, and also as to the fact of his name being upon the list.

The committee are corroborated in this construction of the law, by what they believe to be the usage in many towns in the commonwealth. They therefore report, that the establishment of this allegation does not affect the election.

The committee further report, that the second specification, in the petition, charges the selectmen with 'having declared, that all persons who had voted, at the preceding election, were therefore qualified, and may vote at this.'

The committee find, that conversation to this effect was had

[1] 55 J. H. 32. [2] Same, 169.

by one of the selectmen, with one of the inhabitants of the town, during the canvass; but they do not find, that the board of selectmen, or the presiding officer, made official annunciation of this, as the principle which was to control the qualifications of voters; and are of opinion, that the validity of the election is not affected thereby.

The third and fourth allegations are, substantially, that illegal voters were permitted to vote.

On these allegations twenty persons were proved to have voted, who were assumed to be illegal voters by the petitioners; and six of this number were proved to be illegal voters.

On examination of the return of the ballotings, submitted by the parties, the committee found, that the result of the election would not be affected, even if the whole number, twenty, had been proved to have been illegal voters. They therefore did not deem it necessary to send for the assessors' books, and a list of abatements, in order to revise their minutes of the testimony. These books were put into the case, but taken from the committee, probably by mistake.

The result, supposing the whole 'twenty' had been proved to be illegal voters, would stand thus:—

The whole number of votes, - - - - -	502
Deduct assumed illegal votes, - - -	20
	482
Necessary for a choice, - - - - - -	242
Of the sitting members, John Quiner had the lowest number of votes, viz: - - - - - -	264
Deduct assumed illegal votes, - - - -	20
And said Quiner has - - - - - - -	244

The committee therefore report, that the sitting members from Marblehead, viz: Frederick Robinson, James Goodwin, Ezekiel Darling, William Widger, Jr., and James Quiner, are entitled to their seats."

The report was agreed to.[1]

[1] 55 J. H. 244.

HOLLISTON.

The validity of an election is not affected, by a neglect of the collector, to make a return to the selectmen, of the names of persons paying taxes, agreeably to the requisition of the statutes of 1822, c, 104, § 2, and 1833, c. 102, § 1, (Rev. Stat. c. 3, §§ 3, 4.)

Nor by a neglect of the selectmen to hold a meeting, one hour previous to the town-meeting, for the revision of the list of voters, as required by the former statute.

The election of Ebenezer H. Currier and Elias Bullard, members returned from the town of Holliston, was controverted by Martin Cutler and others,[1] on the several grounds, stated in the following report of the committee on elections[2]:

"The petition alleges: 1. That the collector of said town neglected to comply with the law of March, 1833, requiring a return to the selectmen of persons paying taxes, to the end that a correct list of voters may be made.

The committee find that no such return was made by the collector, and are of opinion, that this neglect of the collector is insufficient to avoid the election.

The petition alleges: 2. That the selectmen neglected to hold a meeting one hour previous to the town meeting, for the revision of the list of voters, as required by law.

The committee find that the selectmen held a meeting for this purpose, a short time, probably half an hour, before the town meeting; and that on opening the meeting, proclamation was made for all legal voters, whose names were not already on the list, to come forward, that they might be placed there.

The committee are of opinion, that no irregularity upon this allegation was proved, sufficient to affect the election. The petition also alleges generally, that illegal voters voted.

The committee find that one illegal voter, namely: William Andrews, voted for the sitting member, Elias Bullard, and that said Andrews had resided in Holliston only since the 18th of October last.

The petition also alleges, that two votes bearing the name

[1] 55 J. H. 32. [2] Same, 319.

of Eben. H. Currier, which were not entirely severed when put into the ballot box, were afterwards torn asunder by the sitting member, Elias Bullard, who is a selectman of said town of Holliston, in order that they might be counted separately.

The committee find that these votes, if attached to each other as alleged, could only have been connected at one end by about one eighth of an inch of uncut paper, they having been cut almost asunder in the usual manner, preparatory for their distribution. One witness, Benjamin Hoffman, swore that he saw the sitting member, Elias Bullard, tear those votes apart; that he heard the noise that is made by tearing paper, and said at the time to said Bullard, 'I think your votes stick together.'

It was proved in the defence, by a witness, John P. Jones, who swore that he heard the remark of Hoffman, aforesaid, and 'at that time his eyes were on said Bullard's hands;' that he did not see him tear the votes, as described by Hoffman; that the votes did not seem to be attached at the end, but seemed to adhere across each other; that if they had been so attached and torn as described by Hoffman, he should have seen it done.

This testimony was corroborated by another witness. Both these witnesses had as good opportunity to observe said Bullard's movements as Hoffman had.

At the time when Hoffman swears he heard the noise occasioned by tearing these votes asunder, there probably were from one hundred to one hundred and fifty men in the town hall, and many of them in conversation, as is usual while votes are being counted. There was also a press of active persons near the town officers, waiting for votes, for re-distribution to their respective friends, in the event of no choice.

The committee cannot conceive that the tearing of one eighth of an inch of paper, under such circumstances, could have been audible; and are of opinion that the charge is unsustained by the petitioners.

The testimony upon this charge has been given somewhat at length, from a sense of what is justly due to the reputation of the

sitting member, Bullard, who, in the opinion of the committee, should be fully acquitted of any improper or dishonorable conduct on this occasion.

On the last allegation, namely, 'that the sitting members were not elected by a majority of the legal votes polled at said election,' the committee find, that, in reference to the sitting member, Eben. H. Currier, this allegation is not proved, and report that said Currier is entitled to his seat.

Upon this last allegation, in reference to the sitting member, Elias Bullard, the committee find, that the town clerk made up his report from the return of the town officers, who sorted and counted the votes, and that his report stood as follows:— Bullard, 102; Littlefield, 83; scattering, 12: and that thereupon said Bullard was declared to be duly elected.

The committee also find, that after the meeting was dissolved, it was ascertained, that at least nine scattering votes which had been assorted by the town clerk, and pushed by him toward the centre of the table, were accidentally omitted in the report aforesaid, and that said report should have stood thus: Whole number of votes, 206; necessary for a choice, 104; Bullard had 102; Littlefield, 83; scattering, (12 counted and 9 omitted,) 21. Deducting the illegal vote of William Andrews, which was given for Bullard, it appears that there was a deficiency of three votes for the choice of Bullard.

The committee also find, that the error was accidental, and that the town officers are not obnoxious to the charge of an intentional dereliction from duty.

The committee accordingly report, that the supposed election of Elias Bullard is void, and that his seat ought to be declared vacated."

On the fourteenth of March, this report was discharged from the orders of the day, and taken up for consideration. It was accepted so far as relates to the right of Ebenezer H. Currier to his seat, and, so far as it relates to the right of Elias Bullard, and declaring that he was not duly elected, was rejected. On motion of Mr. Metcalf, of Dedham, it was then

voted, that the said Elias Bullard is duly elected a member of the house, and entitled to his seat therein.[1]

[The only part of the report in this case, which particularly affected the right of Mr. Bullard to his seat, was the statement of the committee, that there was an omission, on the part of the town officers, to include, in the whole number of votes given in, nine scattering votes, which, if counted, would have changed the majority. In the debate upon the question of the acceptance of the report, the evidence, upon which the committee founded their conclusion, that these nine votes were omitted, was very fully and minutely detailed by the chairman; but, in the opinion of a great majority of the members, the facts disclosed, though they rendered it probable, that such was the case, were not sufficient to make it reasonably certain; and, upon that ground, the report, as to the seat of Mr. Bullard, was rejected.]

PEPPERELL, MENDON.

[The elections in these towns were controverted, but no investigation was had in either. The petitioners in both had leave to withdraw.]

[1] 55 J. H. 406.

1835.

COMMITTEE ON ELECTIONS.

Messrs. *Henry Chapman*, of Greenfield, *Frederick Robinson*, of Marblehead, *Thomas Wetmore*, of Boston, *Robert Campbell*, of Pittsfield, *David T. Brigham*, of Worcester, *Jesse Pierce*, of Stoughton, *Leavitt Thaxter*, of Edgartown.

ORANGE.

A by-law of a town having provided, that town-meetings should be warned "by posting up a copy of the warrant fourteen days, at the least, at the public meeting-house, except on special occasions, and then to be warned by the constable," it was held, that the election of a representative, on the fourth Monday of November, was such a "special occasion," and that seven days' notice of the meeting, in such case, was sufficient.

THE election of Hiram Woodward, returned a member from Orange, being controverted by William Brooks and others, was investigated by the committee on elections, who reported thereon as follows:—

"That the petitioners allege, that the supposed election of said Woodward was void, because the town-meeting was warned by giving seven days' notice only, when the by-laws of said town required a copy of all warrants for town-meetings to be posted up fourteen days prior to the time of meeting.

The time of notice being admitted by the sitting member, the petitioners then offered as evidence, to support their allegation, an abstract from the town records, in the words following: 'Voted, that town-meetings be warned for the future, by posting up a copy of the warrant fourteen days, at the least, at the public meeting-house, except on special occasions, and then to be warned by the constable.' Here the petitioners rested their case, no evidence being offered by them to shew what construction had been given by the town to the phraseology of the by-law.

On the part of the sitting member, it was contended, that less than fourteen days' notice was sufficient on special occasions, and that the right to convene, for the election of a representative, on the fourth Monday of November, was such an occasion.

In support of this position, evidence from the town records was introduced to show, that the town had called meetings for important purposes, such as for the election of representative in the congress of the United States; which meetings had been holden on seven days' notice, and such notice given in

the same manner as the notice for the meeting at which the said Hiram Woodward was elected. It was further proved by the sitting member, that the meeting, on the twenty-fourth of November last, was unusually large, and that no objections, on the ground of want of notice, were made, until the balloting resulted in the election of the said Woodward.

From the above statement of facts, the committee are unanimously of the opinion, that the said Woodward was duly and legally elected a member of this house, and is entitled to his seat. All which is respectfully submitted."

This report was made to the house, on the twentieth of January, and was read and accepted immediately.[1]

WOBURN.

It is essential to the validity of an election, that the selectmen, by whom it is conducted, should be previously sworn to the faithful discharge of the duties of their office.

Jonathan Thompson, Jr., and others, having called in question the election of John Wade, Stephen Nichols, and Oliver B. Cooledge, returned as members from the town of Woburn, the committee on elections, to whom the petition was referred, reported thereon as follows :—

" After a long and minute investigation of the evidence, both for and against the different allegations, contained in the petition, they have come to the following conclusions. The different charges made by the petitioners, to invalidate the election of the members from Woburn, are recited in the order in which they were considered by the committee, and their opinion follows each allegation.

1st Allegation. ' One citizen was seen to vote twice, at the first balloting for a representative, and his vote, the last time, was received in an improper place, and out of the order of the

[1] 56 J. H. 84.

check list, by Captain Stephen Nichols, one of the presiding selectmen, and one of the representatives returned, and was by him conveyed into the ballot box, without any examination of the check list.'

The evidence in support of this allegation, did not satisfy the committee that the selectmen were aware of the fact, that an individual had voted twice; and even that fact of itself was left in doubt, for the evidence in regard to the deposit of different ballots, by the same person, was, in some particulars, contradictory.

2d Allegation. 'While the first ballot for a representative was counting, the chairman of the selectmen, (Col. John Wade,) who was the first representative returned, was seen to take from the ballots cast, two papers containing names, which he afterwards put into his pocket.'

This allegation was substantially proved, but your committee were of the opinion, that the two pieces of paper were withdrawn by Col. Wade upon the ground that they were not ballots, and that they had been deposited by mistake. They were openly taken from the box, and the evidence clearly showed that there was no intent to do wrong, on the part of the presiding officer.

3d Allegation. 'During a moment of excitement, there was a press towards the selectmen's desk, and several persons were seen to raise their hands, and to drop votes into the ballot box on the table, of all which no notice appeared to be taken by the presiding officers, nor were any names checked.'

The evidence sustained this allegation, but the committee believe the charge to be immaterial, because no illegal voting was shown to have taken place.

4th Allegation. 'That the votes for a first representative were erroneously counted by Capt. Stephen Nichols, there being more counted for John Wade than he actually received.'

The evidence introduced to support this charge was not, in the opinion of the committee, sufficient to authorize them to consider the allegation as proved.

5th Allegation. 'That while the ballots were counting for

the first representative, certain papers, having every appearance of ballots, were swept from the table, by John Wade, Esq., at that time one of the candidates.'

The fifth allegation was so far sustained by the evidence, as to shew, that papers were swept from the table, but it did not appear to the committee, that those papers were ballots, although the witnesses testified that they had that appearance.

6th Allegation. 'The chairman of the selectmen declared the whole number of votes, on the first ballot, to be 320, of which 162 were for himself, and thereupon he declared himself to be elected. By the record, made by the clerk, it appears, that the whole number was 320, that John Wade had 162, John Cummings, 124, Joseph Gardner, 20, Stephen Nichols, 7, Benjamin Wyman, 4, and scattering, 3; which record is not true, because Benjamin Wyman had thirteen votes, instead of four.'

This allegation was fully supported by the evidence. Thirteen votes were proved to have been deposited in the ballot box for Benjamin Wyman, which votes, with the exception of four, were, by some error or accident, omitted in the statement of the result of the ballot. The evidence on this point was voluminous, and the committee could not insert even an abstract of it, without extending their report to a most undesirable length. They will, however, briefly state, that after the ballot box was turned, a portion of the votes were counted by Charles Carter, Esq., one of the selectmen. Among those ballots, four were found to contain the name of Benjamin Wyman. The residue of the votes were sorted by Col. Wade and Capt. Nichols. All the votes, however, for Col. Wade, were counted by Capt. Nichols, and it appeared by the evidence that Col. Wade took no part in counting any of the ballots. As the number for each candidate was ascertained, the amount was given to Oliver B. Coolidge, the town clerk, to be recorded; but in stating the result of each, to the town clerk, the tone of voice was so low that the number could not be heard by the spectators. The committee will here remark, in passing over this part of the case, that the town clerk is

one of the sitting members, embraced in the petition. And although it appeared by the evidence, that he wrote down the number of ballots each candidate had received, yet he did not assist, either in counting or assorting the votes; and it was equally clear, that he did not cause, or in any way partake of, the error that occurred. After the computation had been made, the result was declared by Col. Wade, as contained in the above allegation. The loss of the nine votes for Benjamin Wyman must have happened, either during the process of assorting by Col. Wade, or in the act of counting by Capt. Nichols: or else, they were lost in a way to which the evidence furnishes no clew. As there was no testimony to shew fraud on the part of Col. Wade or Capt. Nichols, and as they were in presence of, and almost in contact with, an hundred watchful opponents, it would seem, that any attempt on their part to frustrate the will of the majority, by an act of unfairness, would have been, under the circumstances of this case, impossible. The nine votes given for Benjamin Wyman were, nevertheless, lost. Had they been counted, they would have changed the majority. The whole number would have been 329: necessary to a choice, 165; and John Wade having received only 162, would not have been elected. The committee, therefore, are of the opinion, that the omission of the nine votes abovementioned is fatal to the validity of the election of John Wade.

7th Allegation. 'The selectmen were not sworn until some days after the votes were received, sorted, counted, declared, and recorded.'

The fact asserted in this allegation was admitted by the counsel for the sitting members. They contended, however, that the omission did not affect this election; 1st, upon the ground, that no oath was required of selectmen, to qualify them to preside at the election of representatives to the state legislature; 2d, that if the stat. 1833, c. 141, did require the oath, then the omission might render the selectmen liable to a penalty, but could not be construed to make void the election. These questions depend upon the construction of the act of

the 19th of March, 1833. The first section of that act makes it the duty of the selectmen, 'to make and seal up a separate list of the persons voted for, as governor, lieutenant-governor, councillors and senators, and representatives in the congress of the United States, and transmit the same to the secretary of the commonwealth or to the sheriffs of their respective counties.'

The second section is in the words following: 'Be it further enacted, that the selectmen of the several towns and districts shall hereafter, before they enter upon the execution of their official duties, take an oath or affirmation, before a justice of the peace, or the clerk of the town or district in which they are selectmen, faithfully and impartially to discharge those duties, respecting all elections and the returns thereof, and that a certificate of such oath or affirmation shall be recorded in the town or district records.'

On the part of the sitting members, a most elaborate and ingenious argument was made, to shew, that the words 'those duties,' in the second section of the above recited act, referred to the election of the different officers, recited in the first section of the same statute; the votes for whom they are required in separate lists 'to make and seal up,' and transmit to the secretary of state; and that inasmuch as there was no mention of members of the house of representatives of this state in that section of the act of 1833, it was manifestly not the intent of the legislature to require any oath of the selectmen, to qualify them to preside at the election of the last mentioned members.

To this argument, the committee believe, that a brief and most conclusive answer is to be found in the language of the statute itself. And the question is to be settled by the construction of that statute, upon the ordinary and well known rules, that not only govern the construction of other statutes, but of rules that do also govern the construction of the language in which they are couched. The question is, what is the antecedent to the words 'those duties,' in the second section of the act of 1833? And the answer must be 'their official duties!' To make the duties of sealing up and transmitting the votes for governor, lieutenant-governor, &c., men-

tioned in the first section of the act, the antecedent, would require a strained construction of the language of the statute, and, clearly, at the expense of the true and obvious intent of the legislature. Further than this. Such a construction would require a restricted meaning to be given to the words, 'all elections and the returns thereof,' and this could not be done, without violating a well known rule, applied to the construction of statutes.

The committee, therefore, have come to the conclusion, that selectmen are required by law to be sworn, before they proceed to discharge their duties in relation to the election of representatives to this house.

The above conclusion brings us to the consideration of the second question, viz: Does the neglect of the selectmen, to take the oath prescribed by the statute of 1833, render the election void.

In a government like ours, the fundamental principle should never be lost sight of, even for a moment. The will of the majority must govern. To ensure this, the people, through their authorized agents, have enacted laws, admirably designed to secure the desired end; and their jealous vigilance cannot be too much commended; for, upon the purity of the ballot box, depends the sovereignty of the people. Among other grounds, which the legislature have adopted to protect this important right, they have seen fit to require the sanction of an oath from those officers, who are about to receive, sort, and count the ballots of the people. This oath, too, is required by an imperative statute, which says that the selectmen shall be sworn, before they enter upon their official duties in relation to 'all elections and the returns thereof.' If this provision was intended as a guard to ensure the purity of an election, why should it be withdrawn? In all cases, this house has the power, constitutionally, to set aside the provisions of law, however positive, and admit the person returned to a seat, even though every statutory provision was violated in his election. Would it be wise to adopt such a course? The answer cannot be otherwise than in the negative. And if the aggregate

of checks ought not to be set aside, why should they be dispensed with individually? As yet the sanction of an oath has always been required, and neither reason nor authority has been shown, to set aside this solemn provision of the law. It is a matter of great importance to the community, that this house should settle the questions now presented upon sound principles, in order that their decision may hereafter be cited as a well established precedent. In view of such a decision, the committee have gone further into the subject, perhaps, than was necessary. And yet, they have left many considerations untouched, that have had great weight in bringing their minds to the conclusion that follows, viz.: That the omission of the oath is fatal to the validity of the election, and that Col. John Wade, Capt. Stephen Nichols, and Oliver B. Coolidge, Esq, returned as members of this house, from the town of Woburn, are not by law entitled to their seats."

The foregoing report was agreed to, after a discussion thereof, on two several days, by a vote of 318 to 88, "as to the seventh allegation therein, and the conclusion of the committee of elections thereupon, that the said election is void;" and as to the residue, it was indefinitely postponed, without a division.[1]

The members were allowed their pay up to and including the day of the acceptance of the report.[2]

A precept was afterwards issued to Woburn, for the election of members, in the place of those, whose election was thus declared void, and the same gentlemen were again returned and took their seats.

RATABLE POLLS.

A COMMITTEE, consisting of one member from each county, having been appointed to consider "so much of the governor's speech as relates to amendments of the constitution, or

[1] 56 J. H. 201. [2] Same, 204.

establishing some legal provisions by which the house of representatives may be reduced," the committee voted, that the chairman be instructed to desire the attorney general to attend the committee, and submit to them his opinion on such questions, concerning the matter before them, as the committee might propose.

In pursuance of this vote, Mr. Attorney General Austin addressed the following communication to the committee:—

"Gentlemen,—The questions which you did me the honor to propose to me resolve themselves substantially into this, viz:—

Whether the term 'ratable polls,' in the constitution, c. 1, sec. 3, art. 2, is forever to distinguish the same classes of persons, who, at the adoption of the constitution, were designated by and included within it; or may from time to time, by the legislature, be made to include more or fewer classes than it originally included? A case in point may explain the nature of the question.

At the adoption of the constitution, certain male citizens between the ages of 16 and 21 years were ratable polls. Are citizens of like age always to be considered ratable polls within the meaning of the constitution above cited?

A true answer to the questions you have proposed would determine what power the legislature possesses, to alter the aggregate representation in the popular branch; and because by one mode of considering these questions, the legislature would possess very considerable power to augment or diminish it, there seems, at first view, to be some reason against such a consideration of the subject.

The object of the constitution was to establish a permanent basis for a representation of citizens, and it assumed as a standard of measure ratable polls in municipal corporations.

But if this standard of measure may be varied, and especially if the legislature may vary it, there is nothing permanent in the rule. The same municipal corporation, having in two successive years the same number of inhabitants, may, by a change of the standard of measure, be entitled to larger, or

confined to a smaller number of representatives, in the one year than in the other.

Such a power in the legislature has been sometimes supposed inconsistent with the spirit of the constitution, and therefore that no construction of the constitution, which should authorize it, could be correct.

But it should be remarked, that no change in the standard can alter the rule of proportion, which will continue to be the same that it now is, in relation to every town in the commonwealth, whether the whole number of representatives be many or few.

It may also be proper to question the soundness of any argument, drawn merely from the supposed inconvenience of allowing to the whole legislature a power over the number of representatives in the popular branch. Legislators are themselves the people. They are so directly, intimately and entirely a portion of the people, that the last danger ever to be apprehended, to the liberties and freedom of the commonwealth, is that which will arise from any exercise of their authority.

It may also be questioned, whether a standard, liable to be changed, from time to time, by the intelligence and judgment of the whole government, so as to meet the changing wants and convenience of a growing and vigorous people, does not better comport with their prosperity and happiness, than one, which, established in the infancy of the commonwealth, might refuse to bend its iron rule to the increasing stature of the state.

But whatever speculative opinion might be entertained on this question, it seems to me to be settled by authority, from which I do not feel at liberty to appeal. I refer to the opinion of the supreme judicial court on an application made to the judges, under an order of the house of representatives of the 6th February, 1811, reported in Mass. Term Reports, vol. 7, page 523, and inserted in the Reports of Contested Elections in the house of representatives, page 107. See *ante*, 117.

To understand the application of that opinion to the present

questions, I must ask your indulgence to a preliminary remark.

The term 'ratable polls' in the constitution has at different times been the subject of difficulty in two respects. First, in understanding what was its precise extent and meaning; and second, that being settled, whether a particular person, or class of persons, came within the definition. For example under the first head, whether it included students, clergymen, soldiers, aliens, &c., and under the second head, whether particular persons, borne on the list as ratable polls, were students, clergymen, &c., within the assumed definition.

In process of time, many of the doubts arising in this respect have been removed, and definitions settled, and it now seems well agreed, that the term 'ratable polls,' designates all those inhabitants who are made liable by law to be assessed to the payment of a poll tax, whether they be so assessed or not; or whether, being assessed, they pay or do not pay.

In one sense, every inhabitant is liable to be assessed; that is, the legislature may enact that his poll shall be taxed, and therefore, whether they do so enact or not, he is exposed to the liability of the enactment, and may be considered taxable or ratable. But this is clearly not the sense in which the term is used in the constitution, because in this sense it would be equivalent to the whole population, and the term 'ratable polls' would be synonymous with all inhabitants, or at least all male inhabitants, which has never been pretended. The term is used in a more restricted sense, and means all those persons who under the operation of a tax act are made liable to taxation *per capita*. The fact of being liable to the action of the assessors, under a law that is in force, not the fact of being liable to be the subjects of a law that is not made, becomes a criterion for determining whether a person is or is not a ratable poll.

This is settled by the uniform practice of the government. Minors over sixteen have always been included in the tax acts, as persons to be rated, and considered of course ratable polls. Minors, under sixteen, have never been included in the tax

acts, and have for that reason alone never been considered ratable polls. But it cannot be doubted that the legislature might include the latter in the next tax act, or direct that minors over fifteen years, or fourteen years, or any other period, in its discretion, should be included, and the persons thus included must thereafter be deemed and taken to be ratable polls.

Whether a person is a ratable poll does not depend on the question, whether the legislature may rate him, but whether the legislature has put him among persons to be rated; and it does not depend upon his being rated by the assessors or other persons, intrusted to carry into operation the direction of the legislature, because it is his liability under the order of the law, and not his compliance with that liability, that ascertains his character as a ratable poll.

The tax acts have uniformly included all males above the age of sixteen years as ratable polls.

But the provision extending to all males above sixteen years included aliens living within the commonwealth.

If, therefore, aliens, by force of that provision, became ratable polls, then the town in which they reside has its right of representation increased by such aliens; and for every two hundred and twenty-five ratable aliens, such town acquires a corporate right to one additional representative.

It became, therefore, a question whether aliens could be ratable polls within the meaning of the constitution.

That question was proposed to the judges of the supreme judicial court, as before mentioned, and the judges replied, that the polls of aliens may, within the true intent and meaning of the constitution, be ratable polls, when and so long as they are made liable by any legislative act to be rated to public taxes.

The effect of this answer is obviously to say, that when they are not made liable by any legislative act to be rated to public taxes, then and thenceforward they are not ratable polls.

The judges add: 'The polls of male aliens above the age of sixteen years are now by law liable to be rated to public

taxes, and now are ratable polls within the intent and meaning of the constitution.'

This plainly implies that only because they were then (in 1811) rated, and not because they had been ratable in 1780, they were to be considered ratable polls within the meaning of the constitution.

The answer, therefore, to the question proposed, on the authority of this judgment and opinion of the supreme judicial tribunal of the state is, that aliens may or may not be rated, and may or may not be ratable polls, as the legislature in its pleasure may enact; and as to them, the term ratable polls in the constitution does not forever distinguish the same classes of persons, who, at the adoption of the constitution, were designated by and included within it.

Placing so much reliance on this opinion of the court, which, though it wants the power of a judgment in due course of law, is not to be considered extra-judicial, it may be proper for me to add some of the circumstances under which it was given; and the more so as it is known to all those, who remember the agitation of that time, that it did not meet with universal approbation, and that the report of the committee of elections of that year entirely dissented from its positions.

The opinion is pronounced on three abstract questions propounded to the judges by the house of representatives, but the circumstances that called for the opinion are not immaterial to the case.

They are substantially as follows: The town of Boston returned forty-two representatives. The assessors of that town certified, that there were 9,557 ratable polls in the town, which would give the town a right to 42 representatives and leave a fraction of 182 polls unrepresented. But it is obvious, that if there were included in the aggregate of ratable polls 183 aliens, and if aliens were not ratable polls, Boston had exceeded its right of representation, and by the course of decisions, as then understood, the seats of the entire number would be thereby vacated.

A petition against the election was presented, and the

committee to whom it was referred reported, that the aggregate number of polls included 706 aliens. It is plain, therefore, that the right of the sitting members depended on the question whether the town, in ascertaining the number of ratable polls, in order to determine the number of representatives it was entitled to send, could constitutionally include, in the number of ratable polls, the polls of aliens residing in the town and by law ratable to public taxes, and predicate a representation thereon which would be a constitutional representation?

Other matters were involved in the controversy on the petition, but a negative answer to this question would be fatal to the sitting members' claims.

Although the committee of elections presented a report differing in its doctrines from the law laid down by the court, no action of the house was had upon it; but what is important no discrimination from that time to the present has been made between the ratable polls of aliens and natives.

Another fact is of some consequence. A bill was introduced to 'establish the legal qualifications necessary to constitute a ratable poll within this commonwealth,' but did not pass into a law. No record preserves the reasons for its being negatived, but many persons can well remember, that the opinion of the supreme judicial court was admitted to settle the question in this way, viz: That the tax act would by the constitution determine who were ratable polls, inasmuch as all who were by such act liable to be rated were ratable polls, and that all who were not made by such act liable to be rated were not ratable polls; and that there was no mode under the constitution, by which an alien should be made liable to assessment, that would not give the town in which he lived a right to count him as a ratable poll.

The same desire which has since prevailed, to diminish the representation, then prevailed. The house returned that year contained 632 members at the election of its clerk.

But the whole argument and opinion in relation to aliens are just as true in their application to any other classes of persons, who at any time have been or now are ratable polls.

All other citizens, who are now included in the tax act, (that is, the last tax act) are ratable polls, and they, and they only, who shall be included in the next tax act, will thereafter, until a subsequent one is made, be the ratable polls on which representation may be predicated.

Aliens are only one class. Native citizens under sixteen years are another class. Native citizens above sixteen and under twenty-one are another

There is some analogy between the political rights of native citizens who are minors, and aliens of any age. Neither class has the personal right to vote, but the number swells the population, and thereby increases the rights of the legal voters where those rights depend on population, as in congressional districts; their property increases the proportion of the public tax paid in the districts where they live, and operates in the apportionment of senators. If, therefore, the legislature, by a provision in the tax act, may make aliens ratable polls or not at their pleasure, whereby a political effect is produced, there seems as sound reason for extending the authority to any and all other classes of citizens, minors or adults, who constitute the subjects of taxation.

Supposing the legislature has such authority, the inquiry next presents itself, how may it be used to effect any considerable reduction in the number of representatives?

No census has been taken, by which the number of polls in the commonwealth above sixteen years of age, and under twenty-one, can be precisely ascertained.

But an approximation may be made to the aggregate of this class, from the United States census of 1830, by which it appears that the white males between fifteen and twenty are 32,864. This column in the census begins a year too soon and ends a year too soon. But probably the male polls between fifteen and sixteen do not differ very much from those between twenty and twenty-one. Supposing the latter class to be the smaller, and that the ratable minor polls numbered in 1830 as many as 32,500, they are not far from 36,000 at the present time. If these are represented, or add to the representation in the house, they give 154 representatives.

By the same census the number of polls of fifty years and upwards in 1830 was 32,766, and is not less than 35,000 at the present time. These give 151 representatives.

If therefore the minor polls hitherto rated or ratable, and the adult polls over fifty years hitherto ratable, should cease to be ratable, the whole number of representatives might be reduced by 304. There would then remain, as appears by the same census, 126,766 polls, now amounting to 139,432, entitling the towns to a representation of not less than 619 members.

It is not possible, from the data thus given, to be precisely accurate. The unrepresented fractions in many towns would have some effect on the total, and the right of one representative, on the first one hundred and fifty polls, would also change the aggregate, and the two items probably about balance each other.

The actual result might, however, be rendered certain, by directing a census to be taken under the authority of the commonwealth; and indeed, by the examination of the returns from each town, in the last United States census, tables more precise might be constructed; but this general view sufficiently well shows the operation of the principle. It will be observed that I have not noticed any exceptions in the class of ratable polls, because such exceptions influence the result too minutely to be taken into this general consideration. No notice is taken, in the foregoing estimate, of the colored population, chiefly because the number is not supposed to be large enough to require it, and because the tables of the census are not prepared with such exactness in reference to them, as to give any satisfactory result. The nearest approximation to be made by the census for 1830 would give for the present time about three thousand colored males in the state over sixteen years of age. But a much larger proportion of this class than the others would come under the exceptions which have already been established by the house of representatives, excluding state and town paupers from the lists of ratable polls.[1]

Nor is it material to attend to aliens as a distinct class. No

[1] This is a mere conjecture.

account being taken of the age of aliens, separate from native citizens, the number of the alien polls over sixteen cannot be ascertained. But the census makes a return of 8,787 foreigners not naturalized, which, if now increased to 10,000, might possibly give 2,500 polls over sixteen years of age. But of these, so many are paupers, that considerable deduction beyond the proportion of their numbers to the whole population must be made.

A law excluding aliens and colored persons from the ratable polls of the state would not diminish the aggregate representation more than from twelve to twenty.

It is plain that any arrangement of the kind under contemplation can only be a temporary remedy for the supposed inconvenience.

The commonwealth, in the rapidity of its growth, under the influence of rational liberty and wise laws, will soon contain an active and busy population, that will give to the classes of ratable polls, then remaining, numbers and power equal to what are possessed by all who are now included in that description.

It will be seen that the progressive increase of population, on which the present number of ratable polls is estimated, is wholly conjectural. The tables of the census give no data for exact calculation, but an estimate formed from the census places the decennial increase at 16.6 per cent., which I presume to be correct.

It is exact enough for the present purpose, to consider this increase as producing the same quantities in the same time, although it is in fact in a geometrical ratio. And it is well enough to take round numbers.

The calculation for representatives is made on the higher ratio, viz: 225 polls for one representative. It is not possible, without devoting more time than could now be bestowed on the subject, and causing more delay than the committee might deem proper, to ascertain the application of the principle in point of fact to each town, or even to see how many towns would, by the adoption of it, lose the right of representation.

Nothing but a rough outline is intended to be exhibited. If, on further examination, it should be thought that the principle might be of any practical utility, it would be easy, with proper care, to trace its operation in detail, and ascertain its precise bearing on every town in the commonwealth.

By the rule of calculation here assumed, the city of Boston has now thirteen representatives for its minor polls, and seven for its polls over fifty years; in all twenty representatives, or within a fraction of one third of its present number.

Should that result be deemed a fair specimen of the effect of the principle through the state, the number of representatives could be thereby reduced nearly one third, and it would take, for its progressively increasing population to restore the aggregate to its present numbers, about twenty years.

But as the assumed mode of calculation gives to the people 923 representatives, as the house is now constituted, which is more than its supposed constitutional character, it is apparent that the application of the whole numbers, in parts, to the several towns, is liable to some error, for which allowance must be made.

Nothing more is intended in the illustration which has been attempted, than to indicate the tendency of a principle, which the legislature has power to adopt.

Having thus presented a view of the power of the legislature, which I think constitutional, and exhibited the probable effect of it, if carried into practice, it is proper for me, in complying with the commands of the honorable committee, to attend to some of the objections, considered as the strongest, which have been urged against its exercise.

There is supposed to be an objection to legislative action on this subject, to any great extent, arising from the third article of the amendments to the constitution made by the convention of 1820.

This objection may be thus stated. By that article every male citizen, of twenty-one years of age, becomes entitled to vote, in case of a residence as therein provided; and provided also, that he 'shall have paid, by himself or his parent, master

or guardian, any state or county tax which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this commonwealth.' If he be not assessed he cannot pay; and if he be not ratable by law, he cannot be assessed. When, therefore, he comes to be twenty-one years of age, he cannot have paid any tax, and of course cannot vote. His right of voting may thus be postponed after he is twenty-one years of age, without his consent.

The whole force of this objection seems to me to bear on the expediency of any action by the legislature, and not upon its constitutional power. The legislature would guard, with great care, the privilege of voting; and especially the privilege secured to the young men, on whose exertions and patriotism so much reliance must be placed for the preservation of our republican institutions. If the objection rests only on expediency, it would not be difficult to arrange the details of a plan by which this supposed evil might be obviated.

The objection leaves untouched the operation of the supposed power of the legislature on minors over sixteen, and under nineteen, or perhaps even twenty years of age.

But the same objection is made to attach to any action of the legislature at the other end of the line. And it must be conceded, that if the legislature prevented persons over fifty (for example) from being rated to a poll tax, all such persons, who had no property, would, in two years, by operation of the constitution, be excluded from the right of voting in the public elections.

How numerous such a class would be, cannot now be known; probably very small. It would certainly be a subject of regret, if a single citizen should be deprived of the elective franchise. But in most operations of a political character, the good of the whole is attended with partial inconveniences. There does not seem to be any fundamental principle violated. Taxation and representation should go together, and he who pays nothing, and is yet protected by the laws, cannot complain because he is not authorized to make them.

Another objection, which is thought by those who urge it to be more formidable in its character, may be thus stated.

By the spirit of the constitution, every corporate town is entitled to at least one representative. All towns which were incorporated at the date of the constitution, whatever may be their number of ratable polls, are secured that right forever. And as 150 ratable polls were required for the first representative, it is expressly provided that 'no place shall be incorporated, with the privilege of electing a representative, unless there are within the same 150 polls.' Many towns have been since incorporated, and enjoy the privilege; but if the character of the ratable polls is changed, by excluding minors and adults, as above suggested, these towns or some of them would no longer contain 150 ratable polls. Therefore, unless they lose their right of representation, the calculation in regard to a diminution of the house would be erroneous, and if they should lose it, a portion of the people, and certain municipal corporations, would be disfranchised.

That one or other of these consequences would follow, seems pretty clear; to what extent is not very certain. That either consequence is an evil, must be admitted; but it is probable that no curtailment of the present number of representatives can be devised by human ingenuity, without being attended with partial inconvenience as a compensation for the general good.

The great objects to be attained are to preserve the corporate right of towns, to maintain an equality between population and representation, and to limit the aggregate number of representatives; and these are in their own nature so conflicting and contrarient, that they cannot be perfectly reconciled. If it be admitted that no present right can be abandoned, in furtherance of the general object, all attempt at reduction must be abandoned. The main object cannot be accomplished unless somebody gives way.

I have no other answer to make to the case above stated than that it is no objection to the constitutional right of legis-

lative action, whatever it may be to the expediency of exercising it.

When a new town is erected out of an old one, no privilege of electing a representative is granted by its act of incorporation. That privilege is derived from the constitution, and the ability of the new town to comply with the requirements of the constitution in such case provided. If the new town has 375 polls, it elects two representatives, and if it has polls enough, it elects three or more. The restraint is imposed on the legislature not to erect the town, unless at the time of the application it contains 150 ratable polls.

The question is yet to be settled, whether if a town, incorporated after the adoption of the constitution, falls into decay, and has at the time of a municipal election less than 150 ratable polls, it may continue to send a representative to the general court. The privilege in perpetuity is conferred only on those towns which existed in 1780.

My own opinion is that such town would lose its right. Certainly if it had chosen two representatives, and so far fell into decay as to have less than 375 ratable polls, it could choose but one. If the case of Danvers, (*ante*, 49,) and the case of Malden, (*ante*, 293,) in the reports of controverted elections, affirm a general principle, this is now the settled law; for in those cases it is resolved that the extent of the right of representation, as given to the towns and districts of the commonwealth by the constitution thereof, is to be regulated by the number of ratable polls, actually existing in the towns and districts, to be represented, at the time of any election.

The only answer to the authority of these cases is, that the diminution is made in one instance by death, removal, or decay; in the other, by a legislative disqualification. In both the fact exists, namely, a want of a sufficient number of legal ratable polls; and it is this fact, and not the cause of it, by which the municipal right of the corporation is to be ascertained.

On the whole, therefore, I beg leave very respectfully to

submit to the honorable committee, that, according to the best opinion I can form, the elaborate and well argued judgment of the supreme judicial court, above referred to, affirms and maintains the proposition, that the legislature may by law establish what shall or shall not be a ratable poll, by providing in the tax act who shall or shall not be liable to be rated; and that when this is done by such legislative act, the representation in the house of representatives must be predicated upon the number of such ratable polls, according to the ratio which the constitution has established; and that any inconvenience which might result to individuals or corporations by the exercise of such legislative power is no reason against the constitutional right, but addresses itself to the sound discretion of the legislature, to act or not act, as in their wisdom the general interests of the commonwealth may require in the premises.

JAMES T. AUSTIN,
Attorney General.

February 10*th*, 1835.

1836.

COMMITTEE ON ELECTIONS.

Messrs. *William J. Whipple*, of Cambridge, *Nathan C. Brownell*, of Westport, *Edward G. Loring*, of Boston, *Benjamin Thompson*, of Charlestown, *Jubal Harrington*, of Worcester, *William Child*, of Springfield, *Nathaniel Hinckley*, of Barnstable.

NEW MARLBOROUGH.

Depositions are not admissible in evidence, to invalidate an election, unless the member whose right is in question has been notified of the intention to take them, or was present at the taking thereof.

Where the right of an elector to vote, at an election of representative on the 9th of November, 1835, was called in question, on the ground, that he had not paid the requisite tax; and it appeared, that such elector had not paid any county tax assessed in the year 1834 or in 1835, previously to the day of the election; but it did not appear, that no county tax was assessed between the 9th of November, 1833, and the assessment of taxes for 1834; it was held, that the evidence produced did not cover the whole term of two years next preceding the day of the election, and did not invalidate it.

The election of Levi L. Smith, returned a member from this town, was controverted by Benjamin Wheeler, Jr. and others, in a petition upon which the committee on elections made the following report:—

"The said petition sets forth, that, at a legal meeting of the inhabitants of said town for the choice of representatives, held on the ninth day of November last, the said Levi L. Smith was declared chosen, and that he has been returned, as representative of said town.

The petitioners allege, that said Smith was not legally chosen a representative, "because his election was procured by the votes of persons who were not qualified to vote, as the constitution provides; that the names of Luther Brown, Spellman Curtis, Asher Daniels, Gideon Granger, Salmon Hall, William Jackway, Thomas King, Ezra Olds, Jonathan Olds, Jonathan Olds, Jr., Zenas Rhoades 2d, Theophilus Smith, John Stannard, Joseph Stannard, Aaron Stevens and Newman Wheeler, were placed on the list of voters by the selectmen of said town; and that they, the said Brown, and the others above named, neither of whom had paid, by himself, or by his parent, master, or guardian, any state or county tax, which had, within two years next preceding said election been assessed on him, in any town or district of this commonwealth, and neither of whom was exempted by law from taxation, were permitted to vote, and did vote, at said meeting in the choice of representative."

The petitioners declared, that their interposition was not made from feelings adverse to the sitting member,—whom they consider an honest man and a respectable and worthy citizen,—but from a desire that the constitution and laws in relation to elections should be regarded and obeyed; and they concluded by praying, "that the election of said Smith may be declared void, and his seat in the house vacated."

Sundry depositions were offered, and,—it not appearing that the sitting member had been notified of the intent to take them, or been present thereat,—were rejected by the committee.

The evidence in the case, received by the committee, is contained in the depositions of Joseph W. Howe, Harlow S. Underwood, and Salmon G. Keyes, and is as follows:—

Joseph W. Howe is town clerk of New Marlborough, and testifies, that at a legal meeting of said town, held on the ninth day of November last, for the choice of governor, &c., Levi L. Smith was declared chosen as a representative to represent said town in the present general court; that the votes at said meeting were: For Levi L. Smith, 179; Henry Wheeler, 156; scattering, 15; and that the said Luther Brown and the fifteen others before named, together with one Rosewell Cove, voted at said meeting.

Harlow S. Underwood testifies, that he was chosen collector of taxes for the town of New Marlborough, on the third of March, 1834, that the assessors of said town committed to him, for collection, the tax list for town, school, and county tax, dated September 12th, 1834; and that the persons above named, to wit, Luther Brown and others, including Rosewell Cove, have not paid any tax to him. This deposition was taken January 2d, 1836.

Salmon G. Keyes testifies, that he was chosen collector of taxes for the town of New Marlborough, in March, 1835, that the assessors of said town committed to him for collection, lists of town, school, and county taxes, dated October 2d, 1835; and that Luther Brown and the others above named, including Rosewell Cove, had not paid him previously to the town-meeting in November last, for the choice of governor, &c., in any way, any tax, or part of a tax.

The foregoing is all the evidence received by the committee.

The petitioners allege the disqualifications of the said Luther Brown and others, who are proved to have voted in the election of the returned member, to consist in *the omission to pay the tax required by law*, as one of the requisites to a legal vote.

The constitution (Amendments, art. III) requires, as prerequisite to the right to vote in the election of representative,

the payment of any state or county tax, which shall, within two years next preceding the election, have been assessed upon the voter, in any town or district of the commonwealth.

County taxes are annually granted by a resolve of the legislature. The resolve for county taxes for the year 1833 was passed January 25th of that year. The committee find no law, requiring county commissioners to issue their warrants for assessing county taxes, within any prescribed time or portion of the year. The evidence shows, that the said supposed illegal voters had not paid to the collectors of New Marlborough any county tax assessed in the year 1834, or in 1835, previously to the ninth of November. But it does not appear, that no county tax was assessed between the ninth of November, 1833, and March, 1834; and, inasmuch as the petitioners are bound to produce satisfactory evidence of disqualification, and the evidence produced does not cover the whole term of two years next preceding the election, the committee think the sitting member is entitled to the presumption of law, that the persons who were permitted to vote in the elections were legally qualified.

Wherefore the committee are of opinion, and do report, that the right of Levi L. Smith to his seat as representative from New Marlborough is not disproved by the evidence in the case.[1]

This report was agreed to.[2]

[Among the depositions on file are several which were rejected by the committee, for the reasons stated by them in the report, which furnish evidence, as to some of the voters questioned, covering the whole term of two years next preceding the election, that they had not paid any tax assessed upon them during that period. If these depositions had been admissible in evidence, it is fairly to be inferred from the course of reasoning adopted by the committee, that the election would have been declared void, provided the number of illegal votes had been sufficient if rejected, to prevent a choice.]

[1] 57 J. H. 214. [2] Same, 255.

ADAMS (*First Election*).

The selectmen have no authority, at their discretion, to adjourn a town-meeting, without a vote of the meeting; and if such an adjournment takes place, while an election is in progress, and before it is completed, it cannot be legally completed at the adjourned meeting.

THE election of Henry Wilmarth and Ebenezer Cole, returned as members from the town of Adams, was petitioned against by Jabez Hall and eighty others, and reported upon as follows by the committee on elections:—

"At the election of representatives, holden at said Adams, on the second Monday (the ninth day) of November, 1835, the whole number of votes returned on the ballot for first representative was 623; Stephen B. Brown had 311 votes; Henry Wilmarth had 312, and was declared to be elected by a majority of one vote.

On the ballot for second representative, the said Ebenezer Cole received, and was declared to be elected by, a majority of twelve votes.

From the evidence submitted to the committee, it appeared that the equality of the political parties in the town of Adams rendered the result of the election altogether doubtful, until it was closed, and that from this fact and other circumstances, great excitement prevailed during the whole election, which, commencing on said Monday, was closed on the Wednesday following.

That for causes invalidating the election of said Henry Wilmarth, the petitioners state:—

1. That one Ezekiel Bliss, a legal voter, presented his vote for the said Stephen D. Brown, which was by the selectmen refused.

Of this fact no evidence was offered to the committee.

2. That Jacob Thompson put in two votes.

3. That Lorenzo D. Bailey put in two votes.

At the hearing before the committee, after the case was opened, and the evidence submitted on the part of the petitioners, a motion was made by the respondents for a postpone-

ment of the hearing, to enable them to produce the testimony of said Thompson and Bailey and said selectmen of the town of Adams, in relation to the facts above stated. Thereupon, it was proposed by the petitioners, and agreed to by the respondents, that the testimony of Jenks Kimball, so far as it relates to said facts, should be waived, and the hearing proceed as if so much of said Kimball's testimony was not in the case. The hearing proceeded, and no comment was made on the part of Kimball's testimony referred to, by either party, but it was considered as withdrawn from the committee.

As the testimony referred to was waived by the counsel for the petitioners, on a motion to procure further testimony, and as what the result would have been, had such further testimony been introduced, cannot be known; the committee are of opinion that the testimony waived should not be considered in determining the validity of said Wilmarth's election.

But, as the matter before the committee of elections is not the private interest of the petitioners and respondents, but a public interest exclusively within the control of the house of representatives, and not to be affected by the agreements or admissions of any persons; the committee submit the testimony waived, as before stated, to the house.

Jenks Kimball testified, as follows: 'I think Jacob Thompson voted twice, and know Lorenzo D. Bailey voted twice, and informed the selectmen of the facts. Jacob Thompson was called twice on the same ballot, and the town clerk, Henry Wilmarth, observed that his name was on the list twice, through mistake; when it was objected he had voted before, Col. Wilmarth examined the list and found his name not checked, then he voted again; this was on Tuesday, in the forenoon; this was before the box was turned on the first ballot.'

(On being asked by the respondents,) 'Be you sure Jacob Thompson voted on the first day?'—the deponent replied, 'Yes, I am sure he voted.'

For causes invalidating the election of said Wilmarth and Cole, the petitioners allege, first, that on the eve of the

election, and after the assessors had made out their annual assessment, and committed the same to the collector of said town, the assessors entered on the list, then in the hands of the collector, the names of forty persons who had not been previously taxed for years on account of their age and poverty, and that the said persons were permitted to vote in said elections; and the names of the persons thus entered are annexed to said petition. This allegation is followed by another substantially the same, and referring to the same persons.

The committee are of opinion that these allegations are proved by the testimony, and as to the fact found, that the names of persons who voted were placed on the collector's list at an illegal and improper time, it is deemed immaterial, because it is not a pre-requisite to the right to vote, that the voter's name should be borne on the said collector's list at all; therefore, the fact that it is placed there, at an illegal time, cannot destroy the right to vote. The effect of the facts stated, on the qualification of the persons named, will be considered under a subsequent allegation referring expressly to 'illegal voters.'

Thirdly, the petitioners allege, that before the canvass was completed, to wit, on the first day of the election, the chairman of the selectmen proclaimed that the meeting was adjourned to the following day, without any vote of the town; and after the meeting was thus adjourned by the chairman, he, the said chairman, took the box containing the ballots up to that period, and carried the same away with him, said box not being tacked or sealed up.

This allegation is followed by two others, stating the same and additional facts, of which the committee find (from the testimony submitted to them,) the following to be material:—

That on the evening of the first day of the election, and after candle lighting, the votes for governor were counted, and there appeared to be a majority of votes for Edward Everett; that then motions were made to adjourn, and subsequently, to count the votes for representative; that confusion and noise occurred, accompanied with cries of 'adjourn,' 'no adjournment, count the votes,' &c., from the different parties who occu-

pied the different sides of the house, in which the election was held; that the noise and cries lasted from ten to fifteen minutes, then ceased, and were again at intervals renewed; that the chairman said a motion to adjourn was made, and remarked, as he frequently had, in the course of the election, 'that order must be preserved, or that he could not do business,' or words to that effect; that the chairman did not put or attempt to put the motions to the meeting, but on his own authority, or that of the selectmen, declared the meeting to be adjourned to 9 o'clock the next day, and then taking with him the ballot box, in the manner stated, he, with the selectmen, left the house, and the people dispersed.

The material fact set forth in these allegations, and proved by the testimony relating to them, is, that the chairman of the selectmen adjourned the meeting on his own authority, or that of the selectmen, without taking a vote of the meeting, and against the declared will of a large portion of the voters assembled.

The committee are of opinion, that neither the chairman of the selectmen, nor the selectmen, have the power of adjourning a meeting, at his or their discretion, or without a vote of the meeting.

The constitution, in the tenth article of amendments, declares that 'meetings may be adjourned, if necessary, for the choice of representatives,' without specifying whether they shall 'be adjourned' by the vote of the meeting, or by the officers presiding, or who shall determine the necessity of an adjournment.

The act 1795, c. 55, § 1, for regulating elections, provides, that 'the selectmen present shall preside in such meeting, and shall regulate the same,' and section 3d, 'shall have all the powers which are legally vested in the moderator of town-meetings, for the regulation thereof.'

The act of 1785, c. 75, § 6, provides, that the moderator 'shall be empowered to manage and regulate the business of the meeting,' and then minutely details the powers of the moderator, all of which contemplate the maintenance of order only;

the power to adjourn town-meetings is not mentioned; such a power is nowhere expressly given to the moderator, or to selectmen; and if they possess it from the statutes cited, it can only be by inference from them.

But the committee do not consider that the power to 'preside over a meeting and regulate the same,' or 'to manage and regulate the business of a meeting,' involves a power which may determine its duration, silence its debates or prevent its purposes; and in their construction of the statutes referred to, they feel not only confirmed but directed by the revised statutes; these statutes, c. 15, prescribe the duties and powers of moderators, and adopt without any material change, the language of the act of 1785, c. 55; they also by a distinct new provision, § 25, place the power of adjourning the town-meeting in a vote of the meeting; this is deemed by the committee a legislative declaration, that the power to adjourn town-meetings is not given to moderators by the act of 1785, for the chapter quoted (from the revised statutes,) manifestly (by adopting the same words of grant) gives them all the powers they had before by the act, and yet expressly provides that this power of adjourning town-meetings shall be placed elsewhere.

The revised statutes, (in the chapter quoted) direct the committee in construing the constitution, as well as the acts referred to; for if the constitution were considered as placing the power in question in the moderator or selectmen, the revised statutes would contravene the constitution in placing that power in 'the vote of the meeting.'

If neither the constitution nor the statutes give this power to moderators or selectmen, it remains where, in the opinion of the committee, it is placed by the common law of the land, in 'the vote of the meeting;' and this opinion is confirmed to the committee by the usage of this honorable house, and the general practice of the deliberative assemblies known to the law of the commonwealth.

If it is contended that, by 'a *casus omissus*' the law has left this power afloat, not placed anywhere; then it of necessity

follows, that, if placed nowhere, it is not placed in moderators or selectmen; these officers are the creations of the law, and can possess no powers except those with which the law has invested them.

If the adjournment was illegal, it was altogether inoperative, and the case is to be considered as if it had not been; it was no legal continuance of 'the legally notified meeting,' that was of necessity determined by the separation of the voters assembled; the assembling on the following day was not a legally notified meeting, and the proceedings of it were therefore merely void.

The committee find, that, at said election, fifty-one of the votes cast on the balloting for said first representative, and all the votes cast on the balloting for said second representative, were cast after the adjournment aforesaid; and they are of opinion, that the illegality of said adjournment affects alike the election of both of said representatives.

Some of the testimony submitted to the committee went to show, that the noise and confusion of the meeting, at the time of the adjournment, were so great as to render it impossible to put the motions made, or to ascertain the vote of the meeting upon them; but the committee are of opinion, that the weight of the testimony is against this position, and that the noise and confusion of a meeting cannot, under any circumstances, confer upon the selectmen a power to adjourn a meeting, which has not been given to them by the law.

Evidence was also submitted to the committee, going to show, that in previous years, the town-meetings of Adams had been adjourned by the chairman, without complaint or dissent on the part of the voters, and that during the last election, adjournments for dinner were made by the authority of the selectmen alone; but the weight of evidence disproved altogether the usage claimed for past years, and adjournments without dissent, for a short interval of time, were not considered to authorize an adjournment against the declared dissent of a portion of the voters, equal to a half, probably, of the whole number assembled.

It also appears from the testimony in the case, that on the day following the adjournment, at the time and place appointed, voters assembled, and the balloting was renewed, and the business of the meeting proceeded, as if said adjournment had been legal and regularly made.

As the committee are of opinion, that the motion to 'turn the box' was subsequent to the motion to adjourn, they think it was at all events out of order, and the chairman was not bound to submit it to the meeting.

The fact stated in the allegations last above set forth, that the chairman of the selectmen carried the ballot box with him from the meeting on the evening of the first day, is considered by the committee wholly immaterial; if the adjournment was legal, and effected a legal continuance of the meeting, it was the duty of the selectmen to keep the box till the votes were received, and sorted, and counted; and the fact that it was so kept, that they might have abused their trust, is not deemed proof that they did so. If the adjournment was illegal, and all subsequent proceedings void, the state of the ballot box at the time, if known, or its subsequent treatment or custody, cannot affect the decision of the house.

Sixthly. The petitioners allege, that, during the canvass for said Wilmarth, the selectmen publicly proclaimed, that, if they received the vote of one Daniel P. Lapham, they should adjourn, and send for Richmond Brown, to balance the vote of said Daniel P. Lapham; that they did take the vote of said Daniel P. Lapham, and then stated publicly that they should receive no more votes, except the vote of said Richmond Brown, who was notoriously an illegal voter, and known by the selectmen to be such. Afterward the said Richmond Brown came, and the chairman said they would take his vote according to contract.

No evidence was submitted to the committee, in relation to the legal qualifications of either Lapham or Brown, and they are therefore both presumed to have been legal voters.

The other facts stated in the allegation[illegible]re deemed fully proved; but as it appears that the list of voters had been re-

peatedly called before the declaration of the chairman was made,—that the balloting had continued two days,—and that on the first day over five hundred and seventy votes were received, and on the second day only fifty,—and as it does not appear that any legal voter was prevented by the conduct or declaration of the selectmen from giving his vote,—and as this fact is put in evidence by the petitioners, is, from its nature, particularly susceptible of proof, and as the testimony fails to establish it, the committee are of opinion, that the allegation and testimony relating to it are immaterial, except as exhibiting great impropriety in the proceedings and conduct of the selectmen.

Seventhly. The petitioners allege, that the selectmen permitted several persons, to wit, ten, to vote in said election of said Wilmarth and Cole, who were illegal voters.

And the names of said persons are annexed to said petition.

The petitioners objected to Alpheus Rowse and Lorenzo D. Bailey, that they had not the residence in the town of Adams, which was required by the law as a qualification of a legal voter.

In relation to Rowse, the evidence proved that in February last, he left the town of Adams, taking with him his wife and household goods, and said at the time of his departure that he expected to reside in Pittstown, N. Y., a year or longer. He however returned to Adams with his wife in the latter part of July last, and has resided there since. His object in going to Pittstown was to take charge of a factory, as its overseer.

The committee did not find in this testimony conclusive evidence of such an intent on the part of Rowse, at his departure from Adams, as would effect a change or loss of his legal residence.

His actual absence was less than six months, and his declaration 'that he should be gone a year or longer,' rather limits the term of his expected absence, than indicates an intention of residing permanently elsewhere.

He left Adams for a temporary purpose, and in the exercise of his vocation; if it was his intention when that purpose

failed or was completed, be it sooner or later, to return there; his residence would not be lost, and such an intention is consistent with his declaration and the testimony, and is indicated by his subsequent and speedy return.

Other testimony was submitted to the committee, which was deemed by them inadmissible, but which if admitted would not have altered the opinion expressed.

In relation to Lorenzo D. Bailey, the evidence showed, that he went away from Adams in the fall or early part of the winter of eighteen hundred and thirty-three, and returned in the fall of eighteen hundred and thirty-four; and the witness who deposed to these facts testified that 'when he went away the first time, *he run away*;' for what cause, with what intent, and for what time, does not appear. And the committee find nothing in this testimony proving said Bailey not to be a legal resident in the town of Adams.

To all the persons referred to in this allegation, and in the second and third allegations above set forth, as illegal voters, the petitioners objected that they had paid no legal 'state or county tax' within two years, next preceding said election.

In relation to which the evidence showed, that on or about the 20th of October last, the assessors of the town of Adams made the assessment of taxes on the valuation taken for the town, and made up the list for the collector from the assessors' books, in which each person was taxed his proportion of the whole sum the town of Adams was to raise for the town and county tax for the year; the list so made up, being completed, was signed by one of the assessors, and left with the other two, to be delivered to the collector; the collector received the list from the assessors, duly completed, in the early part of November, for collection of the taxes. Two of the assessors took the list from the collector again on the Saturday evening preceding the election, saying, that 'they had omitted some names which ought to have been assessed.' They, with the assent of the third assessor, on Saturday evening, and on Monday morning, (while the election was in progress,) entered the names of the persons referred to in the

several allegations mentioned above;—though the number of persons on the collector's list was thus increased, no alteration was made in the original valuation, or assessments, so that each person previously assessed paid the same sum, and the same proportional part of the whole sum voted by the town and required by the county, that he would have paid had the additional names not been entered on the list of the collector; so much money, therefore, as was received from the persons added to the collector's list, was over and above the sum voted by the town. Of all the persons added to the list, but one was taxed for anything besides his poll.

From the evidence of Daniel Smith, the collector of the town of Adams, it appeared, that the taxes of 1835 were not paid in Adams by Asahel Hurlbert, John Allen, Sidney Barker, Stephen Young, Sylvester Cheesboro', Wm. Dean, H. Pike, Jno. Metcalf, Perry Beers, and Asa Hurlbert; and also, that these individuals had not paid any taxes in Adams for the two years next preceding the election. But it further appears, from said Smith's testimony, that some of the persons added to the collector's list by the assessors, in the manner stated, produced receipts of taxes paid in other towns; who or how many produced such receipts does not appear; so, that, for all that appears, some or all of the persons enumerated above, may have produced such receipts, and proved themselves legal voters at said election.

It also appears from said Smith's deposition, that three only of the persons who were added to the collector's list had, for two years previous to said election, paid in Adams any other tax than the poll tax assessed upon them for the year 1835, under the circumstances above detailed, and it was strenuously contended by the petitioners, that the act of the assessors, in entering names on the collector's list at the time and in the manner they did, was altogether illegal; that it created no 'tax,' and that the payment of the money assessed was not a payment of any 'legal tax,' and gave no right to vote to the persons paying it. Admitting this to be true, it is deemed immaterial, because the testimony does not admit of the ap-

plication of the argument to the point under consideration. Although this assessment may have been illegal, and the payment of it inoperative, yet it may be, that some of these persons also were among those of the added list, who, as Smith testifies, produced 'receipts of taxes paid in other towns;' this fact appears from the witness adduced by the petitioner on his cross examination, and his testimony leaves it uncertain who they were; it is uncertain as to each on the list, and therefore uncertain as to all; for, on going through the list, the committee are unable to say of any one, that his legal qualification is disproved; it is only rendered uncertain, and in proving no more than this, the committee are of opinion, that the petitioners fail to sustain the burden of proof that is upon them, and to rebut the legal presumption, that all the votes received by the selectmen were from legally qualified voters.

Eighthly. The petitioners allege, that during the canvass aforesaid the selectmen took from the box in which they were deposited several ballots, to wit, to the number of ten, all of which rendered the said election of representatives uncertain, irregular and void.

The testimony relative to this allegation proves, that a vote was taken by the chairman of the selectmen from the box of votes given for governor on the first day of the election, and put into the box of votes for representatives; but it also appears, that this was done in the presence and with the assent of the voter, to correct the mistake which he had made in depositing his vote in the wrong box, and the objection was waived by the petitioners.

The testimony also proves, that on the second day of the election, a vote was taken out of the representatives' box by the chairman of the selectmen; but it is also in evidence, that the vote was put in illegally and by a man who had voted before, and was openly withdrawn by the chairman in the performance and not in violation of his duty. Some doubt was expressed by the petitioners as to the identity of the vote withdrawn; but as it appears that 'the end of the vote stuck up,' because 'the box was nearly full;' that it was withdrawn imme-

diately after it was put in, the chairman observing 'it is not so far in but it may come out;' the committee have no doubt of what the witness to the fact seems at the time to have believed—that the vote taken out was the illegal vote put in.

Testimony was also given by two witnesses, who deposed that on the second day they were in the gallery, and saw the chairman take a vote from the box, and draw it 'across the end of the box' and drop it on the floor.

It was contended by the petitioners, that the testimony showed that the vote testified to by the two last mentioned witnesses was not the same with the illegal vote before mentioned.

The two last witnesses testified that they were in the gallery twenty-five or thirty feet from the chairman, and that in withdrawing the vote his hand was drawn 'across the end of the box;' while the first witness says 'the vote was not drawn across the end of the box;' but the different location of the witnesses, the two being in the gallery, the one on the floor of the house, and in different positions in relation to the chairman and the box, might account for a discrepancy so slight as this.

It was also contended, that the acts were proved as done on different times, but not one of the witnesses fixed with precision the time of the day, whether forenoon or afternoon, though all agreed that the fact they testified to happened on the second day of the election.

As the chairman was at the time in open meeting, and surrounded by his political antagonists, and under their excited supervision; as the act of withdrawing a vote was one which could hardly have escaped their notice, and no evidence of such an act is given by those in the chairman's vicinity, (save the testimony referring to the vote illegally put in); the committee are of opinion, that there is no proof in the case that the chairman was guilty of the grave charge contained in the allegation.

Tenthly. The petitioners allege, 'that after the selectmen returned the box and votes into the meeting from whence they had been taken the day before, they kept a memorandum of

every person who voted thereafter, with a view to know, as your petitioners believe, when they could with safety close the poll.'

The committee are of opinion, that this allegation is immaterial.

The committee also find that previous to said election, an agreement in writing was subscribed, by some of the petitioners and others of their political party, to raise a fund to prosecute according to law any illegalities which might be practised at said election, affecting its result.

All the testimony submitted to the committee was in depositions adduced by the petitioners, but it appeared by the return of the magistrate taking the depositions, that the selectmen of Adams, and the sitting members of this house from said town, were duly notified of the examination of said witnesses; that they, by counsel, attended the examination, and subjected the witnesses to such cross examination as they thought proper; and the fact, that the chairman of the selectmen, on the eve of the first day of the said election, adjourned the town-meeting without taking or attempting to take a vote of the meeting, appeared from the deposition of one of the said sitting members, and was distinctly admitted by both of them, before the committee, where the parties were heard by counsel.

On the facts, and for the reasons above set forth, the committee are of opinion, that at the town-meeting holden in Adams, as aforesaid, on the second Monday of November last past, for the election of representatives for said town, at this general court, now in session, the chairman of the selectmen of said town illegally adjourned said meeting, while said election was in progress, and before it was completed; and they therefore report that the supposed election of said Henry Wilmarth and Ebenezer Cole is void, and that their seats in this house be declared vacated."

The report was agreed to (283 to 103), and the seats of the members returned from Adams declared to be vacated.[1] The members were allowed their pay to the day of the acceptance of the report, and a precept for a new election in Adams was immediately issued.

A new election took place accordingly, and one of the members elected came in, and was qualified and took his seat. This second election was also controverted, for the reasons and with the result stated in the next report.

ADAMS (*Second Election*).

It is an irregularity, for the selectmen to refuse to put a question of adjournment, regularly moved and seconded, but not sufficient of itself to set aside an election.

THE second election in Adams, at which Henry Wilmarth and Ebenezer Cole were again returned as members, and which was called in question by Jabez Hall and others, gave rise to the following report from the committee on elections:—

"The petitioners represent, 'that at a meeting holden at said Adams, on the tenth day of March current, for the purpose of choosing representatives, to fill the seats of Henry Wilmarth and Ebenezer Cole, whose seats had been declared vacated, the said Wilmarth and Cole were declared by the selectmen, who presided at said meeting, duly elected.' The petitioners deny the legality of the election of the said Wilmarth and Cole, and controvert the same, on the following grounds, to wit:—

1. Because, 'at the opening of the meeting, on the day aforesaid, the chairman having announced that the meeting was open, a motion was regularly made and seconded by legal voters, that the town choose two representatives; and thereupon the chairman put said motion to the meeting, and called for a vote thereon, which was then and there taken, and the contrary vote having also been taken, it was clear and certain,

[1] 7 J. H. 254.

by the comparative number of hands raised, that there was a large majority against sending two representatives; and the petitioners say, that the chairman, noticing this fact, neglected and refused to declare said vote.'

2. Because, 'in the further progress of said meeting, Thomas Robinson, Esq., a legal voter, having noticed the irregularity of the proceedings, and desiring in some form to try the sense of the meeting, as to sending representatives, made a motion to adjourn said meeting to the next day, at 9 o'clock, A. M., which was regularly seconded by several voters in various parts of the house, which said motion the chairman refused to put to said meeting.'

3. Because, 'afterwards, to wit, on the same day, Isaac Hodges, Esq., a legal voter, made a motion to adjourn the meeting to 3 o'clock, P. M. the next day; which said motion was also seconded by several voters; and the petitioners allege, that the chairman arbitrarily refused to put this last motion to the meeting.'

The petitioners state, 'that each and all the foregoing irregularities were committed before the meeting proceeded to ballot for representatives, and, in consequence thereof, the political party who desired the motions to be put, and the votes declared thereon, thus finding the dignity of the law broken down a second time, and a state of despotism introduced, retired from the house, and took no part in the said election of said Wilmarth and Cole.'

The evidence in the case is contained in sundry depositions, taken at the request of the petitioners and of the respondents, and, in the opinion of the committee, does not sustain the petitioners in their first ground of objection against the validity of the election.

In relation to the second objection, urged by the petitioners as cause for invalidating the election, the committee are not convinced, that the testimony introduced is of such nature as to require them to decide, that the election is invalid for the reason therein stated.

In the third ground of objection, and the evidence produced

to the committee in relation thereto, they find cause for reporting such irregularity of procedure as, on principles heretofore sanctioned, and in the case of the very individuals whose supposed election is now controverted, must render void the proceedings of the meeting.

It appears that the voters were much divided in their opinion on the question of electing representatives. Soon after the meeting was opened, a motion was made and seconded, to send two representatives; while this motion was being made, another was made and seconded not to send representatives; and some discussion ensued as to which was the prior motion. The chairman decided that the motion to send was in order; the question on this motion was taken by hand vote, and the chairman declared he could not decide the vote; and then it was determined to decide the vote by ballot.

Between ten and twelve o'clock, A. M., and before the yeas and nays on the motion to send two representatives were called for, motions were made and seconded, 'to adjourn to the tenth of April'—'to adjourn till six o'clock in the afternoon of the next day'—and 'to adjourn to nine o'clock, A. M. the next day'—which motions were debated and opposed, as being out of order. The chairman stated, that 'he did not consider it necessary to adjourn,' and he did not, in either case, put the question of adjournment. Ballot was then taken by yeas and nays, on the motion to send two representatives, and resulted in a majority of thirty-one yeas.

After this result was declared, between four and five o'clock in the afternoon, and before any votes for representative had been given or called for; 'it being rainy, late in the afternoon, and many of the voters having left the meeting;' a motion was made by Isaac Hodges, to adjourn the meeting until three o'clock in the afternoon of the next day, which motion was duly seconded. The chairman, being asked by the mover and by another to put the motion, replied, that he could not put the motion, and neglected and refused so to do; and immediately called for votes for representatives, and the selectmen proceeded to call the list of voters; whereupon some dis-

turbance and tumult followed, and the principal part of one of the political parties soon after left the house, and took no part in the election.

The material fact set forth in the allegation is, that the presiding officer of the meeting refused to put a motion to adjourn, regularly made and seconded. This fact is conclusively verified by the testimony.

In the case of the controverted election from the town of Adams,—decided at the present session,—the illegality of proceeding was the adjournment of the meeting by the chairman, on his own authority, without taking a vote of the meeting, and against the declared will of a large portion of the voters.

In the present case, the illegality arises from the refusal, by the same chairman, to put the question of adjournment, regularly moved and seconded, though thereto especially requested by the mover, and by another of the voters present.

The committee think the latter course as erroneous, and as fatal to the legality of the election, as the former.

On the facts above stated, the committee are of opinion, and do report, that the proceedings of the meeting of the town of Adams, on the tenth of March instant, have rendered void the supposed election of said Wilmarth and Cole; and they recommend that the seat of said Wilmarth in this house, (the said Cole not having appeared to claim his seat,) be declared vacated.

This report was rejected[1]; and, no other or further proceedings being had in relation to the subject, the election, of course, stood confirmed by the house.

[1] 57 J. H. 445, 471, 482.

ASSESSMENT OF A TAX TO QUALIFY A VOTER.

The assessors of a town have no legal authority, after the assessment of a general tax has been made, and committed for collection, to assess a poll or other tax on any person otherwise qualified, for the purpose of enabling him to vote at any election; nor will the payment by any person, of the tax so assessed, qualify him to vote, under the provisions of the constitution.

"The justices of the supreme judicial court, in answer to the question proposed to them by the order of the honorable house of representatives, respectfully submit the following opinion.

The question is as follows:—'After the annual assessment of taxes has been made by the assessors of any town, and committed for collection, can said assessors assess a poll, or other tax, on any person, otherwise qualified, for the purpose of enabling him to vote at any election?'

'And is such person, on the payment of the tax so assessed, qualified to vote at elections, according to the provisions of the third article of the amendments to the constitution?'

This question depends upon the construction of the third article of the amendments of the constitution, providing for the qualifications of voters; which, among other things, vests that right in every male citizen, otherwise qualified, who shall have paid, by himself, or his parent, master or guardian, any state or county tax, which shall, within two years next preceding the election in question, have been assessed upon him in any town or district in this commonwealth.

The question seems to proceed on the assumption, that there can be but one state or county tax in each year, which it designates as the annual tax. We are not aware, however, that there is anything in the law to prevent the levy and assessment of more than one tax in the year, or anything that distinguishes a tax as the annual tax. But it has become so common, if not universal in practice, to levy a tax on the first day of May, that it may be properly enough called the annual tax; but there being nothing in the article in question to distinguish one tax from another, and as it speaks of any tax assessed within two years preceding, we presume the question

is intended to apply to any general tax assessed upon the inhabitants in the course of the year.

The question then will be, whether, after such general assessment of a tax has been made, and committed by the assessors to the proper officer for collection, they can assess a poll or other tax on any person, otherwise qualified, for the purpose of enabling him to vote at any election; and whether such person, upon the payment of the tax so assessed, is qualified to vote.

We are of opinion, that the assessors have no legal authority to assess any tax, under the circumstances named; nor does any person, by the payment of the tax so assessed, thereby become qualified to vote, under the provisions of the article in question.

To prevent misapprehension, it may be proper to state the grounds of their opinion, and to limit it to the cases to which we think it applicable.

The powers of assessors are prescribed, regulated, and limited by statute. By stat. 1785, c. 50, § 1, assessors are to be appointed in each town, who are to be assessors of all such rates and taxes, as the general court shall order and appoint each town to pay, within the space of one year from their choice. It further provides, that they shall be assessors of county, town, and district taxes.

They shall assess the polls and estates within their respective towns their due proportion of any tax, according to the rules set down in the act for raising the same; they are to make perfect lists thereof, under their hands and seals, and to commit the same to a collector, with a warrant, under their hands and seals; they are to return a certificate thereof to the treasurer and receiver general of the commonwealth, with the name of the collector; and they shall also have their assessment recorded in the town book, or leave an exact copy thereof with the town clerk, or file the same in the assessor's office, where one is kept, before the same is committed for collection; and they shall also lodge in the clerk's office the invoice or valuation, or a copy thereof, from which the rates or assess-

ments are made, that the inhabitants, or others rated, may inspect the same. Their duty, in the fourth section, is declared to be that of assessing or apportioning any rate or tax upon the inhabitants or estates, &c.

Some of these regulations seem particularly appropriate to state taxes; but the same statute, section 8, provides, that all county, town and other rates and taxes, shall be assessed and apportioned by the assessors, upon the polls and estates, according to the rules which shall from time to time be prescribed and set in and by the then last tax act; and the assessors shall cause attested copies of such assessments and valuations to be lodged in the clerk's office, or filed in their own, if they have one. Section 11 authorizes assessors to apportion on the polls and estates, according to law, such additional sum, over and above the precise sum committed to them to assess, as any fractional divisions of such precise sum may render convenient, not exceeding five per cent; and in no case to exceed forty pounds.

Without pursuing the legal provisions, respecting the authority and duty of assessors, further, it is manifest from this general view, that the office and power of assessors are special and limited, and that whenever a tax is duly levied by the constituted authorities of the state, county or town, it is their duty to assess and apportion the whole sum, by one act, upon all the polls and estates liable to contribute thereto, ratably and proportionably; and they are armed with power, which the law deems adequate to the purpose, to ascertain who are liable, and in what proportion, thus to be assessed and rated. Before this apportionment can be made, they must necessarily have before them the valuation, embracing all the polls and all the estates thus liable to be assessed. Without this no regular apportionment can be made.

When the apportionment is thus made, the assessment list, or tax bill, together with the valuation, having been placed in a public office for general public inspection, and having been certified to the town clerk, and warrant committed to the collector to collect such rates and taxes, the authority and

powers of the assessors are wholly exhausted; and should they afterwards place the names of other persons on such lists, or on their tax books, the act would be wholly void; and in no legal sense could it be said, that any tax was thereby assessed upon such persons; nor can the payment of any such sum, so placed on the tax list, after it is thus closed and committed for correction, or placed on the assessors' books, be considered as the payment of a tax assessed.

In expressing this opinion, we beg leave not to be understood as intending to suggest, that to qualify one to vote within this provision of the constitution, it must appear that the tax which he has paid is in all respects a legal tax, or that it is competent to go behind the actual payment of a tax, to inquire whether there has or has not been irregularity or illegality in the levying or assessment of the taxes. This is a point, which the person claiming a right to vote is not bound to inquire into, and in most cases cannot know. It is sufficient that he has paid a tax *de facto* levied and assessed upon him. This distinction we think is manifest. In the one case, the tax is an actual tax, although it may be informal, irregular, and even illegal, and of which, perhaps, he might avoid the payment, should he elect to contest it; in the other, it is the mere semblance of a tax, purporting to be assessed by persons wholly unauthorized, and thus is a proceeding utterly void, from which no right can be derived.

Upon these grounds, we are therefore of opinion, as already substantially expressed, that after the assessment of a general tax, and the same is committed for collection, and before another tax is committed to the assessors to assess, they have no authority to assess a poll or other tax upon any person, by the entry of such person's name on the assessors' books, the tax list, or otherwise; that such assessment is wholly void; and that a person, by the payment of such void tax, does not thereby become qualified to vote, according to the provisions of the third article of the amendments of the constitution.

LEMUEL SHAW, S. S. WILDE,
SAMUEL PUTNAM, MARCUS MORTON.

March 31*st*, 1836.

1837.

COMMITTEE ON ELECTIONS.

Messrs. *William J. Whipple*, of Cambridge, *Nathaniel Hinckley*, of Barnstable, *Henry W. Cushman*, of Bernardston, *John C. Park*, of Boston, *Joseph W. Mansur*, of Lowell, *Elijah Seymour*, of Granville, *Amos Shears*, of Sheffield.

CERTIFICATES OF MEMBERS.

The certificate of the selectmen of a town, in the form prescribed by law, of the election of a member therein, on some one of the days within which an election may take place agreeably to the constitution, is sufficient to entitle the member so returned to his seat; and cannot be invalidated by any certificates of other town officers, or by copies of the town records.

A certificate or return is insufficient, which does not specify the year in which the election was made, or the certificate given.

The date of the certificate is not material, provided the election therein recited appears to have been held on the proper day.

The omission of a return on the certificate, that notice was given of the election, and the person elected summoned to attend, is not sufficient to prevent the member from taking and holding his seat.

"The committee on elections, to whom were referred the certificates of the election of members of the house of representatives, having examined and considered the same, report:—That the several certificates from the cities, towns and districts in this commonwealth, of the election of members of the house of representatives, committed to them, are, with the exceptions hereafter mentioned, substantially correct and satisfactory, and that the several persons therein named, have been, so far as appears from said certificates, duly elected, and are entitled to their seats as members of this house.

That the certificate from New Braintree, in the county of Worcester, of the election of Samuel Mixter, as representative from said town, is informal, unsatisfactory, and insufficient, because it does not specify the year in which the election was

made, or the certificate given. But inasmuch as the said Samuel Mixter has resigned his seat in this house, the committee deem no action of the house in relation thereto necessary.

That by a certificate, signed by John P. Read and Liab Lee, as selectmen of the town of Bedford, in the county of Middlesex, dated the twenty-eighth day of November last past, it appears that the qualified voters of said town, having been duly convened in town-meeting on said day, for the choice of a representative in the legislature of this commonwealth, did elect Amos Hartwell, being an inhabitant of said town, to represent them in the general court, to be convened and holden on the first Wednesday of January (then) next.

That, accompanying said certificate, was a statement signed by 'John Bacon, constable of the town of Bedford,' dated the third day of January, instant, declaring 'that pursuant to a law of this commonwealth, the freeholders and other inhabitants of the town of Bedford, in the county of Middlesex, qualified according to the constitution, having been duly convened in town-meeting, on the fourteenth day of November, 1836, for the choice of a representative in the legislature of this commonwealth, did then and there elect Joshua Chandler, being an inhabitant of said town, to represent them in the general court, to be convened and holden on the first Wednesday of January, 1837.' And the said John Bacon certified, that 'the person chosen as aforesaid has been by him, as constable of said town, notified thereof, and summoned to attend.'

That a certified copy from the records of said town, signed by Reuben Bacon, town clerk thereof, also accompanied said certificate, which sets forth that, 'at a legal meeting of the inhabitants of said town, holden on the second Monday of November, A. D. 1836, for the purpose of choosing a representative to represent said town in the general court, next to be holden in Boston, on the first Wednesday of January (then) next, the inhabitants brought in their votes to the selectmen for a representative, which, being sorted and counted and declaration thereof made, as by law is directed, were as follows:—For Joshua Chandler, 70 votes; Amos Hartwell, 38;

John Bacon, 10; William Page, 1; Cyrus Page, 1; and said Joshua Chandler was declared to be chosen.'

That, accompanying said certificate of the election of said Hartwell, was a paper, purporting to be a true copy of one read in town-meeting on the twenty-eighth day of November, 1836, signed, 'Jona. Bacon and others,' which sets forth that, 'Whereas the inhabitants of the town of Bedford, qualified to vote for representative in this commonwealth, did assemble on the fourteenth day of said November, for that purpose, and at the second balloting did make choice of Joshua Chandler, to represent them in the next general court, and made declaration thereof in open town-meeting; and said town chose a committee to wait on said Chandler, inform him of his election, and solicit an answer whether he would accept of said office, which committee attended to that duty, and returned in open town-meeting, and gave to the selectmen said Chandler's answer in the affirmative; after which said meeting was dissolved without further action on the subject; *therefore*, at the meeting (held twenty-eighth of November), called by the selectmen to choose a representative, the subscribers to said paper felt it their duty to enter their protest against any action of the town whatever on that subject, believing that such action would be against the constitution and laws of this commonwealth, and that the said Chandler was the member of the house in the said general court, and protested against the election as set forth in the warrant for the meeting,' on said twenty-eighth day of November.

Having before them the certificate of the selectmen of Bedford, in the form prescribed by law, of the election on the twenty-eighth day of November last, of Amos Hartwell, as representative of said town, the committee are of opinion that, in the papers presented to them there is no evidence which should invalidate his claim to a seat in this house. They have reported the substance of the statements presented to them in this case, that the house may take any order in relation thereto, which may be deemed requisite or expedient.

The certificate from Granby is dated November 17th,
That from Townsend, " " 21st,
Those from Orange and Falmouth, " 30th,
And that from Ashby, December 12th,

last past; but as the several elections therein recited are declared to have been held on the fourteenth day of November last, the committee are of opinion that said certificates are to be received as satisfactory. As however doubts have been represented to exist on this point, the committee have presented the facts to the house.

The certificates from the towns of Hawley, Middleborough and Rochester, do not contain thereon any return stating that notice of the choice was given to the persons therein stated to be elected, and that said persons were summoned to attend. Such return being required by the Rev. Sts. c. 5, § 10, the committee have thought it proper to report the fact, although they are of opinion, that such omission cannot avail to deprive the members elected from said towns of their seats."

This report was agreed to.[1] The Bedford election alluded to in it became the subject of a separate report.

SANDISFIELD.

Illegal votes.

The election in this town was controverted on the ground, that several persons not legally entitled to vote, namely, three persons under the age of twenty-one years, two who had not resided a sufficient length of time in the commonwealth, and one of them not a sufficient time within the town; one person who had not paid the necessary tax; two persons who were *non compotes mentis*, and one pauper, voted in the election; that all these persons were known to be favorable to the members returned, and were believed to have voted for them; and that if these votes were deducted from the number of votes

[1] 59 J. H. 48, 65, 83, 286.

given for the members returned, the latter would not have received a majority of all the votes given in.

The committee on elections reported, "that they had attentively considered the petition and the testimony introduced by the petitioners in support thereof, and were of opinion, that the allegations therein had not been supported; and, consequently, that the members returned were entitled to their seats."

This report was agreed to.[1] Mr. Alvord, of Greenfield, afterwards moved a reconsideration, but the motion failed.

BEDFORD.

Where an election took place on the second Monday of November, and the member elect declined the office, and notified the selectmen thereof, it was held, that a second meeting for the choice of a representative had thereby become necessary, and might be lawfully held on the fourth Monday.

It seems, that where a second meeting for the choice of a representative becomes necessary, the neglect of the selectmen to state from what cause that necessity has arisen, does not affect the validity of an election made at such meeting.

The validity of the election of Amos Hartwell, returned a member from this town, was controverted by Jonathan P. Bacon and others, and referred to the committee on elections, who made thereon the following report:—

"That the said petition represents 'that said town was legally convened on the 14th day of November, last past, for the choice of a representative to represent said town at this present session of the general court, and did then and there make choice of the Rev. Joshua Chandler, and declaration was made thereof in open meeting, and a committee of five persons was elected to wait on said Chandler, to solicit an answer whether he would accept of said office; the committee performed their duty, and returned in open meeting, and gave

[1] 59 J. H. 74, 83.

said Chandler's answer in the affirmative, which was so recorded by the clerk; after which said meeting was dissolved, without further action on the subject.'

The said petitioners further allege, 'that the said Hartwell, the sitting member, is chairman of the board of selectmen in said town, and that the selectmen did neglect to do their duty, as pointed out in the Rev. Stat. c. 5, § 8, and did utterly refuse, though often requested, to comply with the provision of said section; and that said sitting member did issue a warrant, signed by himself and one other of said board, to one of the constables of said town, calling another meeting on the 28th of said November, for some cause not set forth in said warrant, or notice, to choose a representative to represent said town in the said next general court; at which meeting said sitting member was elected by a part of the voters present.' The petitioners conclude, by praying that they may be heard in the premises, and that the house would render judgment as to the legality of the whole proceedings.

An order of notice to the petitioners having been passed,[1] they, the sitting member and their counsel, appeared before and were fully heard by the committee.

It appeared, that the warrant for the meeting on the 14th of November was signed by all the selectmen, was dated the 31st of October, and among other articles therein was the following:—'Article 5th. To give in their votes for a representative to represent this town in the next general court, to be holden in the city of Boston, on the first Wednesday of January next.'

Cyrus Page, constable of Bedford, returns on said warrant, on the 12th of November, that he had served the same by posting notice on each of the public meeting-houses in Bedford, seven days before the date of his return.

It appeared from the records of the town, that the inhabitants thereof met, pursuant to said warrant and notice, on the 14th of November, 1836, and acted on the 5th article in the warrant, in the following manner, to wit, "their votes were

[1] 59 J. H. 74.

brought in to the selectmen for a representative, which, being sorted and counted, and declaration thereof made, as by law is directed, were as follows:—For Joshua Chandler, seventy votes; for Amos Hartwell, thirty-eight votes; for John Bacon, ten votes; for William Page, one vote; For Cyrus Page, one vote. Said Joshua Chandler was declared to be elected. A committee was appointed, namely, William Page, John Merriam, Jonathan Bacon, George Fiske, and John W. Hayward, to wait on Mr. Chandler, and inform him of his election as a representative, and obtain his answer.

The committee reported by their chairman that Mr. Chandler had signified his acceptance of said office.'

A statement, signed by 'John Bacon, constable of the town of Bedford,' dated the 3d day of January last, after reciting the election of said Chandler on the 14th of November last, concludes thus: 'the person chosen as aforesaid has been notified thereof, and summoned to attend, by me, John Bacon, constable of the town of Bedford.'

It does not appear that the selectmen, after the election of said Chandler, gave notice to him of his election as required by the Rev. Sts. c. 5, § 8.

A written communication, addressed to Amos Hartwell, signed by 'Reuben Bacon, T. Clerk,' and dated Nov. 16th, was admitted by agreement of parties, and is as follows:—

'Sir,—Rev. Mr. Chandler notified me last evening, that, upon mature consideration, he must be permitted to decline the honor of serving this town as a representative to the general court, and desired that I should give timely notice to the selectmen of his conclusion, in order that they may, if they think proper, notify another meeting to be holden on the fourth Monday of this month, to choose a representative, agreeably to the 10th article of the amendments to the constitution.'

On the 16th of November, 1836, a warrant was issued by Amos Hartwell and John P. Reed, two of the selectmen of Bedford, directed to either of the constables of said town, requiring him to notify and warn the male inhabitants of said Bedford, qualified as the constitution and laws require, to vote

for representatives to the general court, (by posting a copy of this warrant in each of the meeting-houses in said Bedford) to meet at the town hall, in said town, on Monday the 28th day of November instant, at two o'clock, P. M., to give in their votes for a representative to represent this town in the general court next to be holden in the city of Boston, on the first Wednesday of January next.

On the 18th of said November, 'Cyrus Page, constable of Bedford,' made return thereon that he had served the same by posting a notice on each of the public meeting-houses in Bedford.

The records of said town show, that, 'pursuant to the foregoing warrant and notice, the inhabitants of Bedford assembled in town-meeting on the 28th of November, 1836, and acted on the article therein contained in the following manner, viz:—

'The inhabitants brought in their votes to the selectmen for a representative: the whole number of ballots was one hundred and five; necessary to a choice, fifty-five; Amos Hartwell has sixty-four, and is chosen: declaration of the same having been made, the meeting was dissolved.'

A certificate of the election, on the 28th of November, of said Hartwell, was returned in the usual form, signed by John P. Reed and Liab Lee, selectmen of the town of Bedford; and Cyrus Page, constable of Bedford, states thereon, that the person chosen as aforesaid was notified thereof, and summoned by him to attend. The certificate bears date Nov. 28th, 1836.

It was contended by the sitting member, that the proceedings at the meeting on the 14th, as to the election of representative, were void, and that there was then no election contemplated by law; the said Joshua Chandler not being eligible, he not having the requisite residence in that town. On this point, a majority of the committee were of opinion, that the testimony introduced showed that said Chandler was 'an inhabitant of Bedford for one year next preceding his election.'

It was also contended by the sitting member, that if said Chandler had the requisite qualification as to inhabitancy,—it

being admitted that he had notified the town clerk, on the 15th day of November, that he could not serve as representative—it was competent for the town to elect on the fourth Monday, and that a 'necessity' for a second meeting existed in consequence of such notice.

It was contended by the petitioners, that the town of Bedford, by the election on the second Monday of a representative duly qualified, who accepted that office, and by the dissolution of the meeting without adjournment, had exercised and exhausted all the power which the constitution and laws conferred; and that it was not competent for the person thus elected, and accepting, to resign to the town; but that he should have resigned to the house of representatives; or the town should have applied to the house for authority to make a second election.

It was further contended by the petitioners, that the warrant and notice for the second meeting were unsatisfactory and insufficient, inasmuch as they did not assign the refusal to serve by said Chandler as a reason or cause for a second election, and the qualified voters of said town knowing that an election had been made, and not knowing that the person elected had declined to accept the trust, may well have supposed that no necessity for a second meeting existed, and in consequence thereof omitted to attend the second meeting.

The committee believe, that the facts present a case of novel character, and one which has not been decided by the action of the house as reported in the volume of election cases. They think that cases of similar character may frequently occur; that it is important that the question should be settled; and therefore they have reported the facts in the case.

On a review of these facts, a majority of the committee are of opinion, that the election, by Bedford, on the 4th Monday of November, was not warranted by the constitution and laws of this commonwealth, and they so report for the action and supervision of the house thereon."

A minority of the committee (Messrs. *Park*, *Mansur*, and

Hinckley,) dissenting from the conclusion of the report, submitted their views to the house, as follows:—

"A minority of the committee on elections beg leave respectfully to submit to the house of representatives some of the views and reasons which lead them, with all due deference, to dissent from the report of the majority, in the case of the election in the town of Bedford. They do this the more readily, from a belief that the case presents a new question, one never yet settled; and one upon which it is important that an unequivocal decision should be made.

The facts of the case being correctly detailed in the report of the majority, it is needless to repeat them; but from these facts, the minority have felt themselves compelled to draw the inference, that the sitting member is entitled to his seat.

It is admitted, on all hands, that the meeting of the 14th of November was legally notified and held; that the Rev. Joshua Chandler was elected, notified, and accepted. There may be doubts in the minds of some persons whether that gentleman was eligible, but upon this point the minority express no definite opinion, it having no influence or bearing upon the view of the case taken by them. At this point, the majority stop, and allege that the town, as such, was *functus officio*, that it had completed all, that by the constitution and laws it could do, and that notwithstanding the letter of Mr. Chandler on the 16th, declining to stand; the warrant thereon issued on that day; the return of publishment endorsed thereon on the 18th, and the subsequent formal and legal doings of the 28th; still, that unless Mr. Chandler appears, the town must remain unrepresented, and virtually disfranchised, without wrong act or fault on their part.

The minority place their dissent, first, upon this general, republican, just, and equitable principle, that in a representative community, every town, which wishes and votes to be represented, should have a full and fair opportunity to elect and send a representative.

For this purpose, and to the furtherance of this end, the constitution of the state, in the tenth article of amendment,

reads as follows: 'The meeting for the choice of governor, lieutenant-governor, senators and representatives, shall be held on the second Monday of November, in every year; but meetings may be adjourned, if necessary, for the choice of representatives, to the next day, and again to the next succeeding day, but no further. But in case a second meeting shall be necessary, for the choice of representatives, such meetings shall be held on the fourth Monday of the same month of November.'

Now what can be the necessity which the constitution contemplates might arise? Among other supposable cases, the most glaring and obvious is the contingency, that a town should vote to send a representative, then elect an individual, who, not being present, or for some other reason, should not immediately answer, but should on the next day or two decline. It becomes then 'necessary' that a new meeting should be held, for the purpose of carrying into effect the first vote of the town, which was, that it should be represented.

Secondly. The minority are strengthened in this position by a reference to the Revised Statutes. In the 5th chapter, section eight, it is provided, that 'the selectmen, within three days after such election, shall, either by a constable of the town, or by some other person thereto specially authorized by them, give notice of the choice to the representatives elected.'

Why is it ordered that they shall be notified within three days? Was it not for the purpose of obtaining an early answer from the member elect; so that, if he declined within the three days, ten or twelve days notice might be given for a meeting on the fourth Monday, pursuant to the constitution, and the necessity therein foreseen? If this were not the reason of the three days' limitation, any time of notice would have sufficed, before the first Wednesday of January, provided time was allowed to the gentlemen elected to prepare themselves to leave home, and reach the seat of government.

It may be urged, that the necessity contemplated in the constitution was the possibility of there being no choice on the second Monday and the two succeeding days; but the minor-

ity ask, if provision for this purpose was the object, why was it not provided that the meetings should continue to be daily held until a choice is effected? Why postpone the second meeting ten or twelve days by a constitutional provision, unless to give opportunity to receive declensions and then proceed to a new choice?

It may be urged, that the constitution has made no similar provision for the case of a person elected on the fourth Monday, and declining to accept the office. But it must also be observed, that the same constitution makes no provision for adjournments *de die in diem*, on the fourth Monday as it does on the second; showing that although the framers of that instrument intended to give towns a fair opportunity to carry out their original intentions of being represented, still that they thought two trials sufficient.

Thirdly. The minority are still further strengthened in their opinion and construction of the constitution and laws, by the cases of East Bridgewater and Gill, both decided in 1832, which are considered somewhat in point, to show what has been legislative construction of the word 'necessity.' In both cases, the towns voted to be represented. In both they voted, at the close of unsuccessful ballotings, not to send. Yet new meetings being called on the fourth Monday, and members elected pursuant to the original votes of the town, it was held, that such meetings were necessary, and the members entitled to their seats.

To apply, then, these principles and views to the facts of the case of the town of Bedford. The minority beg leave to point out that the declension of the member elected on the fourteenth (2d Monday) was received by the selectmen within the three days; that a new warrant was promptly issued on the 16th,—in fact, before the three days had expired. This warrant was posted on the meeting-houses, and a return of that fact made on the 18th. Two Sundays intervened between that date and the 28th (4th Monday). The whole number of votes at the second meeting was but fifteen less

than at the first meeting, and a certificate is presented by the member elected at the second meeting.

It is finally to be observed, that the Rev. Joshua Chandler, the person elected at the first meeting, has not appeared to claim his seat; nay, more, he does not sign the petition against the sitting member.

The minority respectfully submit the above suggestions as the reasons why they shall vote in favor of the sitting member from Bedford."

This report, (the committee's,) after having been discussed on two several days, was indefinitely postponed, by a vote of 252 to 89. The motion for postponement was first made by Mr. Winthrop, of Boston, but being withdrawn by him, was renewed by Mr. Webster, of Haverhill.[1]

[1] 59 J. H. 277, 281.

1838.

COMMITTEE ON ELECTIONS.

Messrs. *Henry Chapman*, of Greenfield, *Frederic Robinson*, of Marblehead, *John C. Park*, of Boston, *Elijah Seymour*, of Granville, *Samuel Tobey*, of New Bedford, *Jonathan P. Curtis*, of Sturbridge, *Austin Smith*, of Hatfield.

CASE OF EMORY BURPEE, MEMBER FROM STERLING.

Removal of a member from the commonwealth, to another state, disqualifies him from further holding a seat as such.

The committee on elections, to whom was referred the memorial of Jacob Conant and others, inhabitants of the town of Sterling, petitioning against the right of Emory Burpee, to hold his seat as a member of this house from that town, hav-

ing heard the parties and had the subject under consideration, submitted the following report:—

"The grounds assumed by the petitioners, as sufficient to vacate his seat, are two-fold: 1st, That the said Burpee, on or about the 18th of February last [since the session], removed from the commonwealth of Massachusetts, into the state of Vermont, with an intention of becoming a citizen of the last named state; 2d, That the said Burpee is not possessed of sufficient estate to qualify him for a seat in the house.

The questions presented by the petitioners, in their memorial, are simple questions of fact; the law being so clear, that residence and a certain amount of property, are essential qualifications for a seat in this house, that no one will be found, probably, who is disposed to contest these propositions.

The proof adduced by the petitioners consisted of evidence from inhabitants of Sterling, and the neighboring towns, and from members of this house. They swore to the repeated declarations of Mr. Burpee, that he had removed to the town of Ludlow, in the state of Vermont, and that he should not return to Massachusetts, with any intention of residing here. They also swore, that he had sold all his property in this state, except a small piece of land; that he had transported all his goods and chattels, with some trifling exceptions, to Ludlow; that his house was occupied by another family; and that he had removed his own to the state of Vermont; that the selectmen had stricken his name from the list of voters; and, so far as general report was evidence, all the inhabitants, who spoke of him, mentioned him as a person who had removed to Ludlow.

One of the selectmen of Sterling also swore, that he heard Mr. Burpee asked this question: 'When do you gain a residence in Ludlow,' and to that question he replied, that 'he did not know how much time was required, but he commenced his residence from the time he went.' The member of the committee on leave of absence, to whom he applied for license to depart, also stated, that Mr. Burpee told him, that he should not return; that he should remove his family from this state,

and that he informed the electors of Sterling, before the choice of representatives, that he could not serve them, in the capacity of representative, longer than six weeks.

The evidence on the second point was insufficient to establish that allegation of the petitioners; therefore, your committee were required to consider but one single point. First premising that Mr. Burpee, when called upon to make his defence, said that he had no counter evidence to offer, further than his own declaration, that he thought the witnesses misunderstood him, and were mistaken. In answer to all his cross-examining questions, however, each and all of the witnesses — many of whom the committee know to be men of high standing and elevated character — persisted in the truth and correctness of their evidence.

Is this evidence, then, sufficient to show, that Mr. Burpee has removed from this commonwealth, with an intention of permanently residing in Vermont? On this question, the committee were unanimous, all deciding in the affirmative, and no one expressing the slightest doubt. Having settled the question of removal from this state to that of Vermont, they have only to apply the law to the fact proved, to show that the seat of Emory Burpee, returned a member from the town of Sterling, is thereby vacated, and that he no longer possesses the rights of a member of this house.

In regard to the concluding prayer of the memorialists, that a writ should issue for a second election, your committee are clearly of opinion, that this is one of the cases, in which it has been repeatedly decided, that the town is not entitled to a precept for a new election.

In conclusion, your committee recommend, that the seat of said Emory Burpee be declared vacant, and that the house decline issuing a new writ of election as prayed for by your petitioners. All which is respectfully submitted by the committee."

This report was agreed to by the house,[1] and pay allowed Mr. Burpee to the time of its acceptance.

[1] 60 J. H. 366, 370.

SELECTMEN OF SHERBURNE, PETITIONERS.

A member elect having died before the meeting of the legislature, but so soon previous to the fourth Monday of November, that there was not sufficient time to give the notice required by the by-laws of the town for a meeting on that day, without posting up the notice on the Lord's day, the house issued a precept to the town for a new election.

THE selectmen of Sherburne, after the assembling of the legislature, petitioned the house for a writ of election to be issued to them, for reasons set forth in their petition, and which are fully stated in the report of the committee on elections, to whom the petition was referred.

The report was as follows:—

"The legal voters of the town of Sherburne were duly convened on the second Monday of November last, for the purpose of electing a representative. At that meeting they made choice of the late Silas Stone, Esq. The election was duly recorded, the requisite notice given to the said Stone, and he was summoned to attend at the meeting of the present legislature. Six days after his election, the said Stone became deranged, and terminated his own existence. In consequence of this act a new choice became necessary; but the time between the day of his death and the fourth Monday of November was not sufficient to give the notice required by their by-laws for a second meeting, without posting up that notice on the Lord's day. It will, therefore, be apparent to this house, that the inhabitants of Sherburne, by reason of the premises, are deprived of a representative upon this floor without any fault on their part. The object of their petition is, to enable them to fill the vacancy occasioned by the death of their late representative elect.

It seems to the committee, that there is but one question involved in the consideration of the prayer of the memorialists, and it is this: Has this house the power to grant a precept for a new election to the town of Sherburne, in the case presented by their petition?

In order to arrive at a correct decision of this question, it is

necessary to examine the constitutional compact, for the purpose of ascertaining what limitations there are, if any, to the general principle, that towns have a right to be represented in this house. The committee are not aware of any that bear directly upon this question, and they would not hesitate to answer it affirmatively, but for a doubt intimated in an opinion of the justices of the supreme judicial court, transmitted to this house during the May session of the year one thousand eight hundred and twenty-six. The doubt may have been unintentionally raised on their part. The court were then considering the case of a member of this house elected to the council, and decided that the vacancy might be filled. In that opinion, they intimate that it may be different in the case of the death of a member. If that doubt rests upon the 2d article of the sixth chapter of the constitution, the committee can only say, that they do not see that it is at all conclusive on that point. They believe it relates mainly to the incompatibility of offices, and was intended to settle doubts as to the right of individuals to hold seats in the legislature, while they were members either of the executive or judicial branch of the government. And without this provision, questions would have arisen in cases where members of the house were appointed or elected to executive or judicial stations. The spirit of all free governments forbids the executive and judicial departments from exercising the legislative power. Consequently, the office of councillor is inconsistent with that of a representative upon this floor. And in case a member is elected from this body to the council, the town have a right to fill the vacancy by a new election. It is to be observed here, that in the article giving authority to fill vacancies in certain cases, there is no prohibitory clause superadded, forbidding the exercise of the right in other cases. The principle that induced the framers of the constitution to insert the provision seems to have been this. The town, having manifested their desire to be represented by the election of a member, are nevertheless defeated, without any neglect or fault of theirs. It is the interposition of a higher civil authority than their own—and one over which they have no control—

that produces a result adverse to their wishes. And for this reason they are of right empowered to fill the vacancy. And by parity of reasoning, whenever the government of the United States has appointed a member of this house to an office incompatible with that of a legislator upon this floor, the house have issued a precept for a new election.

If the committee are right in their assumption of the principle laid down above, what bearing has it upon the question at issue, raised by the petition of the selectmen of Sherburne?

The town have manifested their wish to be represented. They have elected a member; he was duly notified thereof, and summoned to attend at the meeting of the present house of representatives; but here a higher authority than that of a mere earthly tribunal is interposed. And that authority—before which 'the pride of princes and the strength of kings must bow'—has willed it otherwise. The vacancy in this case is owing to the death of the late member elect. The cause the inhabitants of Sherburne could neither see nor control. Why then should they be deprived of the exercise of their right of representation? The committee can see no good reason for such a decision.

There is yet another view of the power of the house in this case. The constitution has made it the sole judge of the validity of the election of its members. From its decision there can be no appeal. If, then, the house shall deem this a proper occasion to issue a precept for a new election, that election, with their sanction, will be valid. Of course, the house would never exercise the power upon this ground, unless justified by the principles of sound policy, as well as the principle of virtue, upon which a republican government only can be based.

In conclusion, the committee recommend, that the prayer of the petitioners should be granted."

This report was agreed to, and a precept issued accordingly for a new election.[1]

[1] 60 J. H. 101, 109.

BARRE.

Where two or more candidates are voted for at the same time, each piece of paper given in as a vote, and having a name or names on it, is a ballot, whether it have the requisite number of names on it or not.

THE election of Otis Allen, one of the members returned from this town, being controverted by Francis D. Rice and twenty-five others, was reported upon by the committee on elections, as follows:—

"The petitioners presented the following document:—

'At a legal town-meeting of the inhabitants of Barre, on the 13th of November, 1837, the town voted to send two representatives to the general court; and voted that the names of the two candidates be brought in on one ballot.

The ballots were brought in, sorted and counted, and were as follows:—For Charles Rice, 239 votes; Otis Allen, 232; James Newcomb, 226; Nathaniel Loring, 226; John King, 2; Jonas Smith, 1.

The whole number of ballots declared to be 465. A true copy of the record, Attest, LYMAN SIBLEY, Town Clerk.

Barre, January 16, 1838.'

Timothy Adams testified that he was one of the selectmen, that the above paper was in the hand writing of Lyman Sibley, and that he believed it to be a genuine record; that he was present at the election, and held the box; that he thinks that 232 votes had both names on them, viz.: Charles Rice and Otis Allen; but that it is possible that each voted for the other on a single ballot; that he believed that the three scattering were not on single votes; that at the close of the balloting, it was declared that the whole number of ballots was 465; that 233 were necessary for a choice, and that Charles Rice only was chosen; that there arose a debate on that decision, and that the opinion of the selectmen was finally overruled, and they were persuaded to sign a certificate for Charles Rice and Otis Allen; that the ground then assumed was, that if all the votes for Charles Rice and his leading opponent James Newcomb were withdrawn, Otis Allen had a majority of all the remaining votes.

Charles Rice was called by the sitting member, and testified that he had voted for Otis Allen on a single vote.

It was suggested, that if all the votes were added together, and the amount divided by four, the result would be 231 1-2, and as the sitting member had 232, that he was chosen.

The law of the commonwealth regulating proceedings at elections is contained in the Rev. St., c. 4, § 13, and is as follows:—

'SEC. 13. In order to determine the result of any election in this commonwealth, the whole number of persons, who voted at such election, shall first be ascertained by counting the whole number of separate ballots given in; and no person shall be deemed or declared to be elected, who shall not have received a majority of the whole number of ballots; and in all returns of elections, the whole number of ballots given in shall be distinctly stated; but blank pieces of paper shall not be counted as ballots.'

The committee, under the guidance of this law of the commonwealth, feel compelled to recommend, that the seat of Otis Allen, one of the members returned from Barre, be declared vacant."

This report was debated and agreed to[1] (249 to 21), and pay was allowed Mr. Allen to the day of its acceptance.

A precept was also issued for a new election in Barre.[2]

CASE OF ELBRIDGE G. FULLER, PETITIONER.

It is not the duty of a town clerk to record anything more than what is declared by the selectmen to be a vote.

Where a seat was claimed by one not returned a member, and it was proved, that he had offered to treat the voters, and authorised others to do so, previous to the election, the house declined acting in any manner on the petition.

THIS was a petition of Elbridge G. Fuller, setting forth that he was duly elected a member of the house from the town of Holland, and praying that he might be admitted as such.

The committee on elections, to whom the petition was referred, reported thereon as follows:—

"The depositions of nearly every qualified voter in the town of Holland were submitted to the committee, and in many instances two depositions were offered from the same individ-

[1] 60 J. H. 192, 104. [2] Same, 111.

ual; besides which, many witnesses were present and were examined in person.

The petitioner, being called upon to produce the record of the town-meeting, did so; from which it appeared, that the town first voted to send a representative to the general court; then voted to reconsider their vote, and voted not to send, and then dissolved the meeting.

The selectmen contended, that the petitioner could not go behind this record, and show that any other vote was passed. But the committee were of opinion, that the clerk was only obliged to record whatever the selectmen declared to be a vote, and the whole ground of the petitioner's claim being, that the selectmen had refused to declare a result of the first ballot to be a vote, when it really was one,—further evidence was admitted.

The corrected list of voters used on the day of election was before the committee, and contained (as was agreed) one hundred and five names. It was satisfactorily proved by Mr. Fuller the petitioner, that twenty-four of these voters were absent at the first ballot,—reducing the number of voters present at that ballot to eighty-one. This fact was not disputed. Mr. Fuller contended before the committee, that the result of the first ballot was:—whole number of ballots, 78; for Elbridge G. Fuller, 41; Ezra Allen, 30; scattering, 7. The selectmen contended that the result was:—whole number of ballots, 85; for Elbridge G. Fuller, 41; Ezra Allen, 37; scattering, 7.

The committee observe, that by the last calculation there were four more votes than the number of voters present; besides, the selectmen could produce the names of but thirty-six who might by any possibility have voted for Allen; and farther that there are forty-one, about whom depositions were exhibited tending strongly to prove that they did vote for Fuller.

There was evidence that after the hat was turned, at the first ballot, the votes were sorted and counted. All the testimony agrees that Mr. Fuller's pile of votes was forty-one, and

that the scattering pile contained seven. Of the other pile there is positive testimony that it contained thirty-seven votes, and as positive that it contained only thirty. One statement sworn to by a very credible witness is, that a person counted Mr. Allen's votes and made twenty-nine,—that some one observed 'there is one under your hand,' he raised his hand, found one, and said 'that makes the thirty.'

The committee think it possible that the mistake may have arisen from some one, in attempting to return the two piles using these words, 'thirty—seven'—and then adding by explanation, 'seven scattering.'

The town clerk had minuted the numbers forty-one and seven, but before minuting a return of Allen's votes, the chairman of the selectmen had separated Fuller's votes into three piles, one for 'Elbridge G. Fuller,' one for 'E. G. Fuller,' and one for 'E. G. Fuller, Esq.' One of the votes for E. G. Fuller, was shown to the clerk, and an inquiry made whether it was a legal vote. The clerk answered that he did not know what was the law in this state, but it would not be so in Connecticut. The chairman then said, 'there are some votes for Elbridge G. Fuller, some for E. G. Fuller, and some for E. G. Fuller, Esq., I do not know what to do with them, and they must bring in their votes again, with the name written in full.' Another of the selectmen said to him, 'you are too fast, you have not yet declared there is no choice.' He then announced that there was no choice.

On the second attempt to ballot, it was announced that one man had put in two ballots, and the balloting was stopped, and a new one was commenced. The person, who was supposed to have put in two votes, was a Mr. Benjamin Franklin, one of Mr. Fuller's friends. But he was proved to be an aged and conscientious man, and the mistake was observed and immediately made public by a Mr. Partridge, another of Mr. Fuller's friends.

On the third and fourth attempts there was no choice; and then the meeting was adjourned to meet in the evening and vote for governor.

The votes stood:—

	Fuller.	Allen.	Scattering.
1st ballot,	41	37 or 30	7
2nd ballot,	39	37	5
3d ballot,	41	37	4

There was evidence that several voters changed their candidate on the second ballot.

The votes for governor in the evening stood as follows:—for Morton, 44; for Everett, 40; for W. Weld, 1.

The one for Weld, (who is one of the selectmen,) was thrown by Mr. Fuller.

Mr. Fuller at an early day demanded a certificate from the selectmen.

The above is a statement of all the testimony deemed by the commitee to be of any great importance. There was some additional testimony tending to impeach adverse testimony, but it was not considered very important. All the depositions are on file, and are accessible to every member of the house, who may desire to investigate them.

The committee are unanimously of opinion, that the following facts were proved or agreed:—whole number of voters in the town, 105; proved absent on 1st ballot, 24; leaving voters present on 1st ballot, 81. If they had all voted, the number necessary for a choice would have been 41.

Elbridge G. Fuller had that number, and should have been declared the member elect.

There was some testimony tending to show that there were offers to treat voters, made by the partisans of both candidates, but the committee did not think it of sufficient consequence to vary the result. There is no law against treating at elections.

The committee therefore recommend, that Elbridge G. Fuller be declared the member elect from Holland, and that he be duly qualified to take a seat in this house."

A minority of the committee on elections, concurring with the majority, in reference to all the facts stated in their report, presented their views in a counter report, accompanied by

several depositions, which were in the case, and not contradicted.

The depositions were as follows:—

Deposition of Reuben Stevens.

I, Reuben Stevens, testify and say, that Fuller never did authorize me to offer rum, but he (Fuller) stated this: that if he was elected, he should treat; that he requested me to state that, "if he was elected, he should treat; the town-meeting was so early in the day, he should find some crackers and cheese, or bread and cheese, or something like that." I stated to others as Fuller stated to me, and I presume I stated to some, if Fuller would not treat, I would.

Question by Linus Child, (counsel for Fuller.)

Did Fuller ever authorize you to say in his behalf to any one, if he would vote for him, that he (Fuller) would treat him or furnish him anything to eat?

Answer. No, sir.

Question by same. Did Fuller ever request you to say to any one, that if he was elected, he would treat or furnish anything to eat?

Answer. I don't recollect that he did.

Question by same. Was what was said by you to voters, said upon your own responsibility, and not at the request of Fuller?

Answer. On my own responsibility.

Question by same. How long have you been a voter in Holland?

Answer. Twenty-nine years.

Question by same. Has it always been the custom for persons elected as representatives, to treat after their election?

Answer. It has till within a few years.

Question by same. Have not the representatives elected in Holland always treated?

Answer. I recollect of only one instance in which it was not.

Question by selectmen of Holland. About how long before the November meeting did Fuller tell you, that if he was elected, he would treat?

Answer. I cannot certainly tell. Should think about two or three weeks.

Question by the same. Did Fuller, at the time of the above conversation, or at any other time, intimate to you a wish that you would endeavor to procure his election?

Answer. I had some conversation with Fuller on the subject, and I stated to him, that I thought I knew of some that would vote for him, and that I should use my endeavors to procure his election, if he would consent to be a candidate.

Question by the same. What did Mr. Fuller say in reply to the above statement made by you?

Answer. He consented to stand as a candidate.

Question by the same. Did he also express his consent that you should use your endeavors to procure his election?

Answer. I think he did.

Question by the same. Was this conversation before or after his assurance that he would treat if elected?

Answer. I don't know whether it was at that time or after.

Question by the same. Did you make known the statement of Mr. Fuller, that he would treat if elected, to the voters; if so, to how many?

Answer. I made known that statement to a considerable number, but don't know how many.

Question by the same. Had you ascertained who and how many would vote for Mr. Fuller, and did you state the result of your inquiries to Mr. Dixon, before the election?

Answer. I think I did, and I told him I thought he would have a majority.

Deposition of Reuben Underwood.

I, Reuben Underwood, testify and say, that about a week before town-meeting, held on the 13th instant, for representative, Mr. Fuller asked me, who I was going to vote for for representative. I told him I did not know, but thought I should vote for Capt. Freeland Wallis. He asked, what made me vote for them cold water men; he said he would not vote for them, but would vote for somebody that would treat. I told him I did not know who would treat; he said there were enough of them that would; he said if they would vote for him, and he went, he would treat them all; they should not go dry, he would give them all they would drink. I answered, I guess I shall vote for you.

Question by L. Child. Did you vote for Fuller?

Answer. I did not.

Question by same. Was the conversation a jesting and romantic one?

Answer. I don't know but it was a laughing talk; my opinion is, I thought he wanted me to vote for him.

Question by same. Were you in earnest or jest when you said, "I guess I shall vote for you then?"

Answer. I guess I was in earnest; no, I was in romance then.

Deposition of Elisha Kinney.

I, Elisha Kinney, testify and say, that I am an inn-holder in the town of Holland, and on the 13th day of November last, the day of election, after the meeting was adjourned from the meeting-house to the tavern, Fuller told me to give the people something to drink. I asked him if he wanted I should treat any only those who voted for him; and he said, yes, you treat all who would drink at his expense. I asked him, if I should let them have all they would to drink, and he said not; let them have only one glass apiece, and that I might take their names down, so as to know that they had had a glass. I should think there were something like forty glasses drank on Fuller's expense, for which he paid me.

Question by selectmen. Did Fuller, at or before the said town meeting, order liquor to be furnished to the voters of Holland, or pay for liquor so furnished, and if so, when, and to what amount?

Answer. He did not, except what I have stated, after the election was over.

Question by the same. Was proclamation made by you, or by any one else to your knowledge, that all the voters could have a drink on Mr. Fuller's account?

Answer. I spoke to all that were in hearing, that all who would drink on Fuller's expense, could be furnished with one glass each.

Question by L. Child. Were all that drank at Fuller's expense of one party?

Answer. I cannot tell. I should think not.

Question by selectmen. Do you know that any drank on Mr. Fuller's account, besides such as voted for him?

Answer. I do not know who voted for Fuller, nor who voted on the other side.

There was also the deposition of Elisha Willis, testifying that Reuben Stevens told him that Fuller would give him as much as he could eat and drink, if he would vote for him.

There was verbal testimony before the committee, that a minor, the son of Col. Allen, offered one individual a glass, if he would vote for his father; and that a Mr. Drake offered a voter the same inducement to vote for the same gentleman. Neither of these acts was proved to have been authorized by or known to Col. Allen, the candidate.

The minority concluded their report as follows:—

"The minority believe that it is the duty of a petitioner, who comes to claim a seat in this house, to come with clean, pure and unsullied hands. They think that the above detailed testimony, which is entirely uncontradicted, clearly shows that the judgment of the voters, in exercising their electoral franchise, had been tampered with by the candidate, and that he offered an inducement,—a bribe, (no matter how paltry or contemptible that bribe may have been,)—to secure the favor and votes of the legal voters of Holland. They prove that he not only offered the bribe, but authorized others to offer it, and in the end paid it.

Believing that the constitution gives us the power to judge of the legality of the election of every gentleman returned as a member of this house; believing that the election of Mr. Fuller, (if obtained at all,) was obtained by illegal means,—by means tending to prostrate the benefits of our right of suffrage, to lessen the sanctity, the holy purity of the ballot box, and eventually (if persevered in and sanctioned) to destroy all confidence in a republican and elective form of government; the minority recommend that the petitioner have leave to withdraw his petition."

The report (of the majority) was rejected, after debate, by a vote of 151 to 189; the question being stated on agreeing thereto; and a motion to reconsider, afterwards made, was also rejected by a vote of 117 to 217.[1]

[1] 60 J. H. 144, 168, 172, 177, 184.

NORTHBRIDGE.

Where there were several ballotings at one election, which was controverted, and the last balloting was proved to have been ineffectual, the member was allowed to show, that he was in fact duly elected at one of the other ballotings.

The fact, that no notice has been given to a member returned, prior to the meeting of the general court, of a petition against his election, is not a sufficient ground upon which to refuse a hearing to the petitioners.

THE election of Paul Whiting, returned a member from Northbridge, was controverted by Hiram Wing and seventy-three others, and reported upon by the committee on elections, as follows:—

"The matter has been delayed until this late day, entirely at the request of the petitioners. The sitting member and the committee have been ready from the first, to attend to a hearing.

At the very outset of the case, a point was raised by Rejoice Newton, Esq., the counsel for the sitting member, which invited and received a full attention from the committee, but which they present to the house, that, if it be thought necessary, it may be acted upon by the whole house. It was an objection, that no notice was given of this petition to the sitting member previous to the session of the legislature, and that a notice to him *now*, of the taking of depositions in Northbridge, was compelling him to leave his post of duty in the house, and return to his home to defend his right to a seat.

The committee are aware, that there is a provision in the Rev. Sts., c. 2, § 7, which provides, that in all petitions to the general court which may affect the rights of individuals, notice *may be* given by personal service thirty days before the commencement of the session. The committee observe, that the statute does not *require* such notice as indispensable, and presume it was intended merely to point out a course, by which the delay of an order of notice issued by the general court might be avoided. The committee are aware, that proceedings on a petition presented at so late a season may give rise to the difficulty suggested, and compel a member to return

to his home and desert his post, for the purpose of defending his right to a seat, but they are not aware that any law or custom compelled them on that account to refuse a hearing to the petitioners.

The petitioners produced the record of the town clerk, by which it appeared that on the fourth ballot, Mr. Paul Whiting had ninety-three votes, and Lyman Taft ninety-two votes. They then produced testimony, that one Gilman E. Walker, who voted on the last ballot for Paul Whiting, was not a legal voter, having moved into this commonwealth within a year, and never having paid a tax in this commonwealth. This evidence was not contradicted, and the committee were unanimously of opinion, that there was no choice on the last ballot, the votes being ninety-two for each.

The sitting member then proposed to show, that he was elected a member from that town on the third ballot. The petitioners contended that he had no right to go back to that balloting; that he himself, as chairman of the selectmen, had then declared no choice on the third ballot by reason of illegal voters, and that he could not go behind that declaration. But the sitting member responded, that the petitioners had set forth in their petition the third ballot as being a basis upon which they claimed a seat for Lyman Taft, and that he himself, now standing in the light of a petitioner for a seat, could urge that the declaration of the selectmen, on the third ballot, was wrong. He then proceeded to take the ground, that on the third ballot, taking their return of votes to be correct, namely, ninety-nine for Taft, ninety-seven for himself, and one scattering, that he could show sufficient illegal votes thrown for Taft, to entitle him (the sitting member) to his seat.

The committee were of opinion, that the sitting member had a right to throw himself back on the third ballot, precisely as a new petitioner might, but they submit that opinion with great deference to the house, as it is on a point strongly contested by the parties.

The sitting member then produced the evidence of the above named Gilman E. Walker, who, on the third ballot, voted for

Taft, and who was clearly an illegal voter, not having paid a tax in this commonwealth; which diminished the votes for Taft one. Next the deposition of Waldo Adams, who voted for Taft on the third ballot, and had never paid any tax, which diminished Taft's vote two. Next the deposition of David Dunn, Jr., who had voted for Taft on the third ballot, and had not paid a tax for two years previous, and which diminished the vote for Taft three. Next the deposition of Libertine Bullard, who had voted for Taft on the third ballot, and had left Northbridge for Milford on the first of last April, with intent there to remain, but returned to Northbridge on the first of October. The law requiring six months' residence, the committee did not think him a legal voter, and this diminished Taft's vote four. He next produced the deposition of Harrison Prime, who voted for Taft on the third ballot, who went to Sutton on the first of April last, with intent to remain, but returned to Northbridge in September last. The committee likewise rejected his vote, and reduced Taft's vote five; making it, instead of ninety-nine, ninety-four. The sitting member likewise produced the deposition of John Thatcher, who voted for Capt. Benjamin Taft on the third ballot, and not having paid any tax for two years preceding, the committee rejected his vote, and considering him the scattering voter, struck that vote out; leaving the vote for Taft 94, for Whiting 97.

The petitioners then undertook to reduce Whiting's votes on the third ballot, and introduced the deposition of E. S. Fletcher, who voted for Whiting on the third ballot. Mr. Fletcher came from Maine to Northbridge, where his father lived, in September, 1836, with intent to remain, bringing his family. Finding no house suitable, he sent his wife visiting to her father's, in Uxbridge, or to her friends in Rhode Island. He remained part of the time at his father's, in Northbridge, and part at her father's, in Uxbridge, about half a mile from his father's; and commenced building a house in Northbridge. He went to meeting in Northbridge, and had his furniture, &c., stored in part at his father's, and partly at her father's. In October, 1837, his house in Northbridge was finished, and

he commenced keeping house there. He had been assessed a poll tax in Uxbridge, in May, 1837, which his father paid. The committee thought, that, in the spirit of the decision of the case of Spencer, 1814–15 (*ante*, 178), Mr. Fletcher was a resident of Northbridge, for six months previous to November 13th, and his vote for Whiting a legal one.

The petitioners then introduced the depositions of Arad Aldrich and Aretas Fletcher, to testify about the same person; but, as in the notice to the sitting member of the taking of depositions, these names were not inserted, but, in lieu thereof, Erastus Fletcher and Ansel Aldrich, the committee refused to admit them.

The petitioners then produced the deposition of Charles W. Taylor, who never paid any tax, and was but seventeen years old. In answer to the question, whether he voted for Paul Whiting, he replied, that 'he could not answer said question.' This appeared to be the only proof that he voted at all. The committee could see no reason why they should deduct a vote from Paul Whiting, as having been given by said deponent.

The petitioners then introduced the deposition of Luther R. White, who voted for Whiting at the third ballot. He was in Northbridge on Saturday, the 11th day of November, but on that day engaged to work in Uxbridge, and went there on that day; lodged there on Saturday and Sunday evenings; on Monday he voted in Northbridge, and in the evening took the residue of his clothes to Uxbridge, and commenced work there on Tuesday. The committee did not think he removed from Northbridge until Monday evening, and saw no reason to strike out his vote.

The result, therefore, was as follows:—

Third Ballot.

For Paul Whiting,	97;	illegal votes,	0——	97
For Lyman Taft,	99;	" "	5——	94
Scattering,	1;	" "	1——	0
Whole number, - - - - - -				191
Necessary for a choice, - - - -				96

Paul Whiting had ninety-seven, and, the committee believe, was chosen. They therefore recommend that the petitioners have leave to withdraw their petition."

The report was agreed to by the house.[1]

MALDEN.

It seems that the requisition in the constitution, that every member of the house, for one year, at least, next preceding his election, shall have been an inhabitant of the town which he is chosen to represent, is not complied with, unless the member is also a citizen during the whole of that time.

The election of Edward N. Harris, returned a member from Malden, was controverted by George Hitchins and others, on the ground, that he had not been a citizen-inhabitant of Malden, for a year previous to his election.

The report of the committee thereon was as follows:—

"The petitioners proved, to the satisfaction of the committee, and the fact was not disputed, that the sitting member was not naturalized until the twenty-first day of October, 1837, being only three weeks and two days before the day of his election.

The constitution requires, that every member of this house, for one year, at least, next preceding his election, shall have been an inhabitant of the town he shall be chosen to represent.

The supreme judicial court, in the case of *Harvard College*, v. *Gore*, (5 Pick. 370,) have decided, that 'inhabitant,' in our laws, implies citizenship; that it is distinguished from 'resident,' and lay down the doctrine as follows:—that the term inhabitant, as used in our laws and in this statute, means something more than a person having a domicil; it imports citizenship and municipal relations; whereas, a man may have a domicil in a country to which he is alien, and where he has no political relations. Again, in the same case, they say:—'Many aliens reside for years within the commonwealth with-

[1] 60 J. H. 188, 207.

out becoming inhabitants of any town or county; for the term inhabitant imports many privileges and duties which aliens cannot enjoy or be subject to.'

The committee thought, that the case of Mr. Harris was so clearly settled by this construction of the constitution, that they deemed other points brought before them of minor consideration, and feel themselves compelled to recommend, that the seat of Edward N. Harris, the member returned from Malden, be declared vacant."

This report, after having been read in the house, was recommitted[1] to the committee on elections, on a motion of a member of that committee, and, it is believed, at the request of Mr. Harris, who soon afterwards resigned his seat,[2] and the committee were discharged from the further consideration of the subject. [See the next case.]

GEORGE HITCHINS AND OTHERS.

The question whether an election is valid, in reference to the right of a town to be represented, in some future year, is one which is to be determined by the house, in which the question of the right occurs.

THE object of this petition is stated in the following report thereon of the committee on elections:—

" The object of the petitioners is to obtain from the house of representatives a decision, that the election of Edward N. Harris, late a member of this house from the town of Malden, is void, and that the town will not thereby be deprived of sending, to this branch of the legislature, nine years hence, two representatives.

In consequence of the resignation of Mr. Harris, there is no practical question raised by the memorial under consideration. And the house, upon the original petition from Malden against the right of Mr. Harris to a seat, discharged this committee,

[1] 60 J. H. 182, 207. [2] Same, 252, 371.

for the above reason, from any further consideration of the subject of that petition.

If the committee were now to present the question of the Malden election to the house, it must assume the following shape:—'Will the town of Malden be entitled to two representatives in the legislature of 1847?' Now it seems to the committee, that this proposition cannot constitutionally be definitively settled by the present house of representatives. The persons, who shall then occupy these seats, will have the right to judge of the validity of the elections, which shall take place during that year, and, whatever might be the decision of this house, whether in the affirmative or the negative, it would not be binding on them.

Why then should this house undertake to settle a question that may never arise, and if it should, to forestall a decision upon the validity of an election, to be made nine years hence? The committee can see no good cause, under any circumstances; and especially at this late period of the session, do they feel unwilling to raise an abstract question, which, if thoroughly discussed, would occupy a great deal of time, and the decision of which, when made, would be wholly inoperative upon those persons, who are to fill these seats at some future period.

Therefore, the committee recommend, that no further action should be had, in relation to the foregoing petition, and that the memorialists have leave to withdraw the same."

This report was agreed to.[1]

RIGHT OF REPRESENTATION.

On the division of a town, or the annexation of a part of one town to another, the right of representation cannot be divided or apportioned.

THE committee on the judiciary, having been directed by the house to consider and report, whether, under the thirteenth

[1] 60 J. H. 377, 469.

article of the amendments to the constitution, the right of being represented in the general court, on the division of a town, or the setting off a portion of one town to another, by the legislature, belonged exclusively to the old town, or might be divided with the new town, or apportioned, made the following report:—

"The decision of these important questions must depend entirely upon the construction of the late amendment of the constitution, which is now a part of the fundamental law, and cannot be altered by the legislature.

The article of amendment was incorporated into the constitution, for the single purpose of regulating and determining the right of representation in the general court. It provided, that a census should be taken on the first day of May, A. D. 1837, and every tenth year afterwards, as the basis of the apportionment among the several towns and cities of the commonwealth, and established the principles upon which such apportionment should be made. It is obvious, that it was the object of this amendment, to provide for an equality of right of representation, at the time the first census was taken, and at the expiration of every ten years, to keep up that equality, by taking a new census, and making a new apportionment. The fluctuations in the population of towns and cities, which may lessen in the intervening time, may be productive of some practical inequality, but no other provision is made for this case, than the taking of a new census, and making a just and equal apportionment, once in every ten years.

The article of amendment provides, that when the census has been duly taken, and returned to the governor and council, they shall 'ascertain and determine,' according to the principles preseribed therein, the number of representatives which each town and city are entitled to elect, 'and when the number of representatives, to be elected by each city, town, or representative district, is ascertained and determined as aforesaid, the governor shall cause the same to be published forthwith, for the information of the people, and that number shall remain fixed and unalterable for the period of ten years.'

A census was taken in May, 1837, and duly returned to the governor and council, and they have 'ascertained and determined' the number of representatives, which each city and town are entitled to send to the general court, for the next ten years, and this is a 'fixed and unalterable' right of each city and town, for that period of time. A new census cannot properly be taken in the interim, between the taking of the first and second census, for this purpose.

The first question contained in the order may be answered in the very words of the constitution. When a town is divided, or a portion of one town set off to another, does the right of being represented belong exclusively to the old town, or may it be apportioned between them? The answer is, that the right of the town, from which the territory is taken, has been 'ascertained and determined' by legal authority, and is 'fixed and unalterable.' Any number of persons may move into it, or, may remove from it, but its number of representatives cannot thereby be increased or diminished, until the census is taken. The same principle must apply to the incorporation of a new town. The rights of those from which it is taken cannot be impaired or affected in the slightest degree as to representation. And it is very obvious, that if the new town has the right of being represented, gross practical injustice would be done to the other citizens of the commonwealth. The towns from which it is taken would retain the right of sending their full number of representatives to the general court, although their number of ratable polls might be diminished to a dozen, and these added to the representatives from the new town, might give to both a far greater number of representatives, than the constitution ever contemplated. It is manifest, also, that if a different principle were now to be adopted, the number of representatives, so far from remaining 'fixed and unalterable, for the period of ten years,' as is expressly provided in the amendment, would be unfixed and alterable every year. As to the question, whether the legislature can apportion the representation in cases where towns

are divided, it is sufficient to remark, that this duty is imposed upon the governor and council, and not upon the legislature."

1839.

COMMITTEE ON ELECTIONS.

Messrs. *Edward Dickinson*, of Amherst, *Caleb Wheeler*, of Bolton, *Samuel C. Allen, Jr.*, of Northfield, *David Nourse*, of Lowell, *Nathaniel Hinckley*, of Barnstable, *Thomas Bradley*, of Tisbury, *David Fearing*, of Hingham.

ESSEX.

The election of David Choate, returned a member from Essex, was controverted on the ground, that two persons, who were citizens of Maine, voted in the election for him, and that if their votes had not been received, Samuel Hardy, the opposing candidate, would have been elected. The seat of Mr. Choate was also claimed by Mr. Hardy, on the ground above alleged.[1] The committee on elections reported, that the petitioners against the election, and the claimant of the seat, both have leave to withdraw, and the report was agreed to by the house.[2]

No reason was assigned by the committee for the conclusion of their report; but it is probable, that the fact of the illegal voting was not proved.

[1] 61 J. H. 42. [2] Same, 93.

HUBBARDSTON.

Treating the voters present at a meeting, at which a candidate was nominated for representative, who was afterwards elected, is not sufficient to set aside the election.

THE following is the report of the committee on elections in this case :—

"The committee on elections, to whom was referred the memorial of Rowland Woodward and others, and the memorial of William Bennett and others, relating to the right of George Williams, returned as a member from the town of Hubbardston, to a seat in this house, have heard the parties, and now present the following report:—

The petitioners against the right of Mr. Williams to hold his seat produced three witnesses, who were sworn, and testified that they were inhabitants of the town of Hubbardston, and were in the hotel of Mr. Clark, in the centre of that town, between eight and eleven o'clock on the evening of Saturday, the tenth day of November last; that there was a caucus holden at the hall in that hotel during that evening, for political purposes; that at about eight o'clock, a large number of persons, stated by the witnesses to be from 50 to 100, came from the hall to the bar-room, filling that and the entry connected with it; that Mr. Williams addressed the persons in the bar-room in this manner: 'Gentlemen, I thank you for the honor you have shown me in nominating me as your candidate for the general court; and now, all of you, who are in the habit of drinking ardent spirits, are requested to walk up to the bar, and to take some, on my account, [or, at my expense,] as it will give me very great satisfaction. You all know how I have been abused. I have been called the captain of the rum company.' After a short pause, Mr. Williams again called upon the people present to 'step up and take something,' whereupon the landlord set down four decanters containing liquors of different colors, which the witnesses supposed to be different kinds of spirit, and perhaps some wine. A bowl of sugar, and a pitcher of water, were also placed on

the bar counter, by the side of the decanters, and any one who chose helped himself to such as he best liked.

One of the witnesses testified, that he heard Mr. Williams say, when urging them to drink, that 'if he had not got money enough to pay the bill, his credit was good till to-morrow.' After the people had nearly all left the bar-room, the witness saw Mr. Williams go to the bar, and, he thinks, saw him take out a bank bill, and give to the landlord, and supposed he was paying for the liquor which had been drank that evening by Mr. Williams's invitation. No one who drank was seen to pay, except Mr. Williams.

Mr. Williams denied having paid for the liquor, and moved the committee to delay the trial, for the purpose of enabling him to procure evidence to disprove the charge of having so paid. On a little reflection, however, he withdrew his motion, and explained the matter in this way; that a few days after the 10th of November aforesaid, he told the landlord that 'he had abused his house, and he would pay for the candles, but would not pay for the spirit which had been drunk.' The committee inquired, what amount he paid for candles, and he replied, one dollar and seventy-five cents. There was evidence, that some of the persons, who drank at the bar, became excited; not so much as to prevent them from walking, but enough to prevent them from walking straight. There was no evidence, that any one who drank at Mr. Williams's expense, on Saturday evening, voted for him, as representative, on the succeeding Monday; or that anything was said by Mr. Williams, or by any one for him, that those who had been treated would be expected to vote for him.

The committee are all satisfied, from the evidence offered on the part of those who petitioned against Mr. Williams's right to hold his seat, as well as from the admission of Mr. Williams himself, that he called for the liquor and paid for it; and they would have entertained a much higher opinion of his course, if he had, at once, frankly admitted the whole facts in the case, rather than resorted to the evasion of pretending to have paid only for the *candles*, used in lighting the hall, a

part of one evening, when the expense of the lights could not probably have exceeded one-eighth part of the sum, which he admits he actually paid. The committee cannot reprobate, in too strong terms, the practice of treating, either before or after an election; and, while a penalty is provided for doing this at all *military* elections, they cannot perceive any good reason, why the same or increased penalties should not be attached to the same practice at elections of members of the general court.

The frauds that are practised *at* the ballot boxes, and *on* the ballot boxes, are believed to originate, in a great measure, in the free use of ardent spirits; and, if the security and the perpetuity of our republican institutions depend upon the purity of elections, all the avenues to the ballot boxes should be most seduously guarded against the approach of any influences that can tend to corrupt the elective franchise.

Having said thus much in relation to the reprehensible practice, in which Mr. Williams is clearly proved to have indulged, the question arises, whether he has been guilty of the charge of bribing persons to cast their votes for him, and thereby obtained his election as a member of this house; and in applying the constitution and adjudged cases of controverted elections, to which they were referred, to the facts in the present case, the committee have come to the conclusion, that they do not find sufficient ground to justify them in reporting against his right to a seat, and they therefore unanimously recommend that he be entitled to retain his seat."

This report was agreed to.[1]

[1] 61 J. H. 200, 201, 214.

RIGHT OF REPRESENTATION.

It is not competent for the legislature, when incorporating a new town from territory of one or more existing towns, to authorize such new town to elect a representative to the general court before the next decennial census of polls shall have been taken.

But it is competent for the legislature to provide, in such case, that the new town shall remain as before a component part of the town or towns from which its territory is taken, for the purpose of electing representatives, until a new decennial census of polls.

THE justices of the supreme judicial court, having been requested by a joint order of the two houses, to give their opinion on certain questions (which are sufficiently stated in the answer) touching the right of representation on the division of a town, or the incorporation of a new town, in answer thereto, made the following communication:—

"The undersigned, the justices of the supreme judicial court, having considered the questions proposed to them, thereupon ask leave respectfully to submit the following opinion:—

It appears to have been the manifest intention of the twelfth article of amendment to the constitution to provide for an equal representation of the citizens, by a distribution of representatives amongst towns, according to the number of ratable polls, at fixed periods of ten years. The system is so arranged, that the power of each town, to choose one or more representatives in any one year of the ten years, may depend upon what it has done in some other year of the period. In other words, the power of a town to choose a representative during the later years of the period, may depend on the fact of their having exercised, or forborne to exercise their power, during the earlier years of the period. There is no authority reserved to the legislature, or to any branch of the government, to take any new census of polls, or to make any new distribution of the number of representatives, which each city, town, or district may choose; and to fix the number of years in which they may choose during a period of ten years. It follows, as a necessary consequence, that the distribution, made at the commencement of each period of

ten years, must remain fixed and unalterable during such period, and until a new decennial census of polls is taken, conformably to the constitution. The same conclusion results from the express provisions of the article of amendment. This article declares that the governor and council shall ascertain the number of representatives, which each town and representative district is entitled to elect, and the number of years within the period of ten years, in which each city, town, and district may elect an additional representative; and when a town has not a sufficient number of polls to elect a representative each year, then how many years, within the ten years, such town may elect a representative. This is to be done at the commencement of each period of ten years. It further declares, that the number of representatives which each city, town and representative district may elect, thus ascertained and determined, shall remain fixed and unalterable for the period of ten years. That which the constitution declares unalterable cannot be changed by law.

We are therefore of opinion, in answer to the first question, that it is not competent for the legislature, when incorporating a new town from territory of one or more existing towns, to authorize such new town to elect a representative to the general court, before the next decennial census of polls shall have been taken, after its incorporation.

In answer to the second question, we are of opinion, that it is within the constitutional power of the legislature, when incorporating a new town, consisting of territory set off from another town, or from two or more towns, to provide by law, that the new town, or the inhabitants of that part of the new town which was taken from the old town, shall be and remain a component part of the town or towns to which such territory originally belonged, for the purpose of electing the representatives to which said original towns were entitled by the preceding census of polls, until a new decennial census of polls shall be taken.

There may be some practical inconveniences in such an arrangement, arising from the difficulties of preparing lists of

voters, warning meetings, attending at different places, for different elections on the same day, and the like. These, however, are rather objections of inconvenience in the exercise of the right, than any constitutional impediment to the power of the legislature. The object is to provide for the representation of the citizens, and not of the towns. As it is manifestly within the power of the legislature to leave each town as it is, during the period of the ten years, for all purposes whatever, it seems not inconsistent with their power, to provide that all the inhabitants now composing it shall continue to act together, for one purpose,—that of electing representatives,—and yet may be otherwise arranged into corporations for other municipal purposes.

Of the convenience and expediency of such an arrangement, and the detailed provisions which it may require, the legislature will judge. We are of opinion, that it is within their constitutional authority to make it.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE,
MARCUS MORTON,
CHARLES A. DEWEY.

Boston, 29th March, 1839."

1840.

COMMITTEE ON ELECTIONS.

Messrs. *Theophilus Parsons*, of Boston, *Stephen P. Webb*, of Salem, *Amos Spaulding*, of Carlisle, *David Joy*, of Nantucket, *Benjamin Mudge*, of Lynn, *David Fearing*, of Hingham, *Lester Williams*, of West Springfield.

MENDON.

The constitution does not admit of an adjournment of a meeting for the choice of representatives, which it provides for being held on the fourth Monday of November, to a day beyond the said fourth Monday.

Two certificates were returned from the town of Mendon, by one of which it appeared, in the usual form, that Laban Bates was duly elected. The other certificate was made the subject of a special report of the committee on elections, and the election of the members thereby returned was also petitioned against by Benjamin Davenport and others, legal voters of Mendon. The following is the report of the committee:—

"The committee on elections find, that one of the certificates from the town of Mendon is in the following words:—

'The subscribers, a minority of the selectmen of the town of Mendon, hereby certify that, at a meeting of the inhabitants of said town, held this twenty-sixth day of November, in the year one thousand eight hundred and thirty-nine, pursuant to adjournment from the twenty-fifth of said November, instant, Leonard Taft and Caleb Thayer, being inhabitants of said town, were chosen to represent them in the general court to be holden on the first Wednesday of January next. Dated at Mendon, this 26th day of November, in the year one thousand eight hundred and thirty-nine.

DAVID DAVENPORT, } Selectmen
JARED BENSON, } of Mendon.'

'Mendon, Nov. 27, 1839. I have given notice to the above named Leonard Taft and Caleb Thayer, of their being chosen representatives, and have summoned them to attend the general court.

DAVID ROSS, Constable of Mendon.'

From this certificate, it appears, that the election of those members took place on the 26th day of November, 1839, which was the day after the fourth Monday of that November. And this committee are unanimously of opinion, that an election of representatives on that day is made void by the following provisions of the constitution:—

'The meeting for the choice of governor, lieutenant-governor, senators, and representatives, shall be held on the second Monday of November, in every year; but meetings may be adjourned, if necessary, for the choice of representatives, to the next day, and again to the next succeeding day,

but no further. But in case a second meeting shall be necessary for the choice of representatives, such meetings shall be held on the fourth Monday of the same month of November.'

The committee are of opinion, that the meaning of these words is perfectly clear, and certain, and that no adjournment, beyond the fourth Monday of November, of a meeting for the choice of representatives, can be lawful.

It also appears, from the same certificate, that it is signed only by a minority of the selectmen; whereas, it is required by law, that a majority of the selectmen should preside at the meeting, and that the same selectmen should sign the certificate. This objection might, perhaps, be open to explanation, by evidence; but the disregard of a precise requirement of the constitution invalidates the election of those members, of necessity. Wherefore, the committee report, that Leonard Taft and Caleb Thayer are not entitled to seats as members of this house."

After this report had been read in the house, and a time assigned for its consideration, a memorial was presented on behalf of the members, Taft and Thayer, claiming a right to be heard before a committee. The memorial having been read, a motion was made to refer the consideration of it to a committee of one from each county, with instructions to cause the same to be printed; but the memorial and the motion to refer were both disposed of, by being laid on the table, by a vote of 265 yeas, to 239 nays.[1]

The report was afterwards (on the next day) considered, and agreed to, by a vote of 275 yeas to 198 nays.[2]

The question, presented in this case, was subsequently submitted to the justices of the supreme judicial court, by an order of the house, for their opinion. The court came to the same conclusion with the house.

[1] 62 J. H. 19, 20. [2] Same, 23.

ADAMS.

The fact, that the polls were kept open until after sun-down, is not sufficient, of itself, and in the absence of fraud, to set aside an election.

THE report in this case was as follows:—"The committee on elections report, that Ebenezer Cole and others, inhabitants of the town of Adams, petition against the right of Ezra D. Whitaker, returned a member from Adams, to a seat in this house, on two grounds:—1st. That a motion to adjourn the town-meeting wherein he was elected was made and seconded, but was not put; 2d. That the poll was continued open until after sun-down.

On the first point, the evidence offered entirely failed to prove the allegation; it being clearly proved, that the motion was duly put and decided in the negative.

On the second point, the fact was admitted by the sitting member. But as there was no allegation or suspicion of fraud or injustice, and no doubt, that the sitting member had a majority of the ballots cast, the committee are not of opinion, that the circumstances of the case are sufficient to vacate his seat; and they therefore report, that the petitioners have leave to withdraw their petition."

This report was agreed to.[1]

NORTHAMPTON.

Petitioners against an election, not having offered any evidence to sustain their allegations, nor, intending to offer any, had leave to withdraw their petition.

A PETITION was presented against the election in this town, in which it was stated, that at the election therein for governor, lieutenant-governor, senators and representatives, the "votes for their public servants were collected of individuals outside of the hall, in the streets, by constables, and afterwards de-

[1] 62 J. H. 176, 185.

posited in the ballot box by said constables, contrary to the statute, which expressly provides and declares, that 'votes shall be deposited in the ballot box by the voter in person,' and in open town-meeting."

This petition being referred to the committee on elections, they reported that the petitioners had not offered any evidence of the allegations therein, and, so far as the committee could learn, did not intend to do so: and the committee therefore reported, that they have leave to withdraw their petition.

The report was agreed to.[1]

WESTBOROUGH.

The fact, that the check list is not used, is not sufficient to set aside an election, provided such neglect does not occasion the reception of an illegal, or the rejection of a legal, vote.

THE committee on elections, to whom this case was referred, reported thereon as follows:—

"The petition of Martin Bullard and others, inhabitants of Westborough, against the right of Otis Brigham and Nahum Fisher to seats in this house, alleges two grounds on which it denies the right of those members to their seats.

The first is, that the check list was not used at the election, and that the votes were not checked off.

The second is, that the polls were not kept open during the time required by law.

The member, who presented the petition, appeared before the committee, and, stating that no evidence would be offered in support of the second ground, insisted only on the first.

The sitting members fully admitted that no use whatever was made of the check list at the election.

As far as the committee could learn, there was no allegation or suspicion that the check list was disused from improper motives, or that it had caused the reception of an illegal vote, or the rejection of any legal vote.

[1] 62 J. H. 150, 188.

The law of last year, c. 42, § 5, provides, that no vote shall be received, 'until the name of the person offering the same shall have been found upon the list, and checked by the presiding officers, or by some one appointed by them therefor.'

The committee regard this provision as one which is calculated to prevent mischief, and as open to no objection; and the 6th section of the same law provides, that 'if any selectman, or other town or city officer, shall wilfully neglect or refuse to perform any of the duties required of him by the third chapter of the Revised Statutes, or by the provisions of this act, he shall forfeit a sum not exceeding two hundred dollars.' But we regard this statute, mainly, as directory to the town officers. And we are of opinion, that however justly a neglect of these directions may be visited upon the town officers who may be guilty thereof, the town should not lose its right of representation thereby, if there were no fraud. Wherefore the committee report, that the petitioners aforesaid have leave to withdraw their petition."

This report was agreed to.[1]

BARNSTABLE.

The superintendent of a breakwater is not ineligible to the house of representatives, as a person holding office under the authority of the United States.

THE report of the committee on elections, to whom this case was referred, was as follows:—

"The petition of Zenas D. Bassett and others, inhabitants of Barnstable, against the right of Daniel Bassett to a seat in this house, alleges, that the said Daniel Bassett was, at the time of his election, and is now, a superintendent of the breakwater at Hyannis, which is an office under the United States, rendering him incapable of being a member of this house.

Upon an investigation of this case, it appears to the committee, that Mr. Bassett was employed to discharge that duty by the chief clerk of the bureau of topographical engineers,

[1] 62 J. H. 36, 59, 71.

and that he has no office or authority, excepting what he derives from a letter from that gentleman.

The committee are of opinion, that this is not 'an office holden under the authority of the United States,' which incapacitates the holder from serving as a member of this house.

In 1791, a deputy marshal of the United States for this district was permitted to hold his seat.[1] In 1804, a commissioner of bankrupts of the United States, who held a commission from the President of the United States, was allowed to remain a member.[2]

The words above quoted are from the amendments to the constitution, adopted in 1822; they are broader than the language of the orginal constitution; but the committee are not satisfied that it was intended, by those amendments, to extend this disability so widely as to cover cases like the present.

The committee therefore report that the petitioners have leave to withdraw their petition."

This report was agreed to.[3]

WEST BOYLSTON.

The fact, that the warrant for notifying a meeting for the choice of representatives does not specify the time for opening the poll, agreeably to the provisions of the statute of 1839, c. 42, is not sufficient, of itself, to invalidate the election.

The report in this case was as follows:—

"The committee on elections find that Ezra Beaman and others, inhabitants of West Boylston, petition against the right of Silas Walker and Benjamin F. Keyes to seats in this house, on the ground, that the warrant, calling the town-meeting at which they were elected, did not conform to the provisions of the statutes.

A certified copy of the warrant was exhibited, which the sitting members admitted to be correct; and the member who offered the petition stated that no other evidence would be offered.

[1] Ante, 34. [2] Ante, 47. [3] 62 J. H. 58, 69, 71.

The inhabitants were summoned to meet 'at one o'clock in the afternoon,' 'to bring in their votes to the selectmen, for a governor, and lieutenant-governor of the commonwealth, and for six senators, on one ballot, for the district of Worcester for the year ensuing. Also to determine the number of representatives said town will choose for the present year. Also to choose one or more representatives to represent them in the general court.' And the warrant then goes on to specify other subjects to be attended to.

From the above statement it is apparent, that the warrant does not specify (otherwise than by implication, if at all) the hour at which the polls would be opened. But there is no allegation or suspicion of fraud in this case, or of any injurious result arising from this omission; and the committee are of opinion, that it is not sufficient to vacate the seats of the sitting members.

The committee therefore report, that the petitioners have leave to withdraw their petition."

This report was agreed to.[1]

BRAINTREE.

Where there is no by-law, in a town, prescribing the manner and time of giving notice of its meetings, no usage can be set up to have the force of law, and to annul any meeting opposed to it, unless that usage be ancient, and so well established, and so precise and definite, that all the inhabitants may be presumed to know the exact force of the usage, as they would of a law, if one existed, and to know, also, clearly and certainly, when the town-meeting conformed to and when it violated the usage.

It is no objection to an election on the fourth Monday of November, that the meeting on the second Monday was adjourned to the next day, but was not adjourned again to the next succeeding day.

If the record of a town-meeting is intelligible and consistent with itself, and contains every material statement required by law, it is itself the best and highest evidence of the facts therein stated, and must stand for truth, unless impeached as fraudulent; but where it is inconsistent and ambiguous, or deficient as to a material fact, the ambiguity may be explained, or the deficiency supplied, by extraneous evidence.

If it cannot be ascertained (either by the record, or by evidence) what was the whole number of votes given in at an election, it is void, for uncertainty.

THE election of Minot Thayer and Joseph Richards returned as members from this town, being controverted by John Hay-

[1] 62 J. H. 69, 71.

ward and others, the committee on elections reported thereon separately.

The report relative to the election of Minot Thayer, was as follows:—

"John Hayward and others, inhabitants of Braintree, petition against the right of Minot Thayer, Esq., to a seat in this house, on two grounds:

The first was, that he was elected at a town-meeting held on the fourth Monday of November, and the town adjourned its meeting of the second Monday to the next day, but did not adjourn again to the next succeeding day. And the petitioners contend, that no town can lawfully hold a town-meeting for the choice of representatives on the fourth Monday of November, unless they have previously tried to effect an election on each of the three preceding days allowed by the constitution. But the committee think that there is no force in this objection.

The second ground of objection to this election rests upon the notice of the town-meeting. The law on this subject is as follows:—

'All town-meetings, for the election of representatives in the general court, shall be notified by the selectmen of each town, in the manner legally established in such town, for calling other town-meetings.' Rev. Sts. c. 5, § 5.

There has never been a vote or by-law of this town, establishing the number of days which must intervene between the notice and the meeting; nor any vote or by-law recognizing and establishing any usage. But the petitioners contend, that there is in that town a usage of equal force with law.

On this point it was proved:—

1. That the petition for the town-meeting was handed to the selectmen on the morning of the third Monday of November; that they delivered the warrant to the constable, with directions for him to post, forthwith, four copies of the warrant in the four places where such notices were usually posted; and that he did so post the same between 4 P. M. and 8 P. M. of the same day.

2. It was further proved, that for some years, (one witness testifying to two, another to five, and another to fourteen years,) notices for the governor's election had been posted fourteen days before the meeting; notices for other meetings about ten days, though sometimes more and sometimes less, and neither witness recollected an instance of less than seven days.

Upon these facts, the committee are of opinion, that, as every town has by law a right to regulate and fix precisely, by a by-law or specific vote, the length of the notices for its meetings,—where the town neglects or refuses so to do, no usage can be set up to have the force of law, and to annul any meeting opposed to it, unless that usage be ancient and so well established, and so precise and definite, that all the inhabitants may be presumed to know the exact force of the usage, as they would of the law; and to know also, clearly and certainly, when the town-meeting conformed to and when it violated the usage. And the committee are of opinion, that no such usage was shewn in this case, and no clear violation of any established usage.

The committee therefore report, that the said Minot Thayer is entitled to his seat in this house."

The report relative to the election of Joseph Richards, was as follows:—

"John Hayward and others, inhabitants of Braintree, petition against the right of Joseph Richards, Esq., to a seat in this house, on the ground that his election is void through uncertainty. The parties were heard by their counsel; many witnesses called on both sides; and the case fully investigated and ably argued.

The record of the town being produced, it appeared, that the meeting of the second Monday of November having been adjourned over to the next day, it was voted at the adjourned meeting to choose two representatives; and after one unsuccessful balloting, the record goes on as follows:—

'Voted, to proceed to the second balloting.
Voted, that the polls be closed in two minutes.
The time having expired, it was voted to close the polls.

The whole number of ballots given in was three hundred and ninety,	390
Alvah Morrison had one hundred and eighty-seven votes,	187
Dr. Jacob Richards had one hundred and sixty-nine,	169
Joseph Richards, Esq., had two hundred and one,	201
Minot Thayer, Esq., had one hundred and twelve,	112
Capt. Samuel French had nine,	9
Amos W. Stetson had seven,	7
Judson Stoddard had seventy-four,	74
Adjt. Samuel Hayden had two,	2
Benjamin Stevens had two,	2
Joseph R. Frazier had two,	2
Col. Freeman White had four,	4
Col. Otis Wild had forty-four,	44

Joseph Richards was declared (by the moderator) to be chosen.
Voted, to dissolve the meeting.

If the votes cast for all the candidates, as above stated, be added together, they amount to 813. If every ballot had the names of two persons, there must have been at least 407 ballots; and if there were any single votes, the number of ballots must of course have been greater. It follows, therefore, that the whole number of ballots, by this statement, is more than 390, and more than twice 201, which was the number cast for Joseph Richards.

Here, then, is a case where the whole number recorded differs from the number found by adding together the recorded details. The committee doubted, whether they were not bound to the practice which in such cases rejects the whole number. If that were done, it is obvious that Joseph Richards had not a majority of the ballots.

The question then occurred whether the committee could receive evidence to explain this record, or to supply its deficiencies. On this point, the committee are of opinion, that where the record of a town-meeting is intelligible, and consistent with itself, and where it contains every material statement required by law, then the record is itself to be taken as the best evidence, and must stand unless impeached as fraudulent. In this case, however, the record is not consistent with itself; upon its face there appears to be an important ambiguity; and the committee concluded, that it was proper to let in evidence to explain the record, if possible.

To this course both parties assented; and the town clerk and selectmen were examined. But it was found that no explanation whatever could be given. Almost immediately after the meeting was dissolved, the selectmen discovered that they had made a mistake somewhere; but they did not know, and do not now know where the mistake exists, or how or by whom it was made. No witness knew, or stated any fact from which the committee could infer with any certainty, or even any clear probability, whether the whole number of ballots as first stated is right; or whether the whole number, as obtained by adding and dividing the details, is right; or whether, if the whole number is stated aright, and the details are wrong, the error in the details falls upon the statement of the votes cast for Joseph Richards, or of those cast for some other person or persons.

Under these circumstances, the committee regard this election as void for uncertainty; and they therefore report,

That Joseph Richards, Esq., is not entitled to a seat as member of this house."

These reports were severally agreed to.[1]

WILBRAHAM.

Where the record of a town-meeting is defective, in not stating the whole number of ballots given in at an election, the defect may be supplied by evidence.

The report of the committee on elections, in this case, was as follows:—

"Abel Bliss and others, inhabitants of the town of Wilbraham, petition against the right of John Carpenter to a seat in this house, on the ground, that that gentleman had not a majority of the ballots given in.

On the part of the sitting member, a paper was exhibited to the committee, which was proved to be a transcript from the record. This paper contained the following statement of

[1] 62 J. H. 91, 111.

votes for representatives, and nothing more on this subject, namely:—'For Stephen Stebbins, 186 votes; John Carpenter, 160; Pliny Merrick, 143; Samuel B. Stebbins 144; J. W. Rice, 1.'

It farther appeared to the committee, that the original record of the town-meeting contained no statement of the whole number of ballots, and that, in fact, the ballots were not counted in order to ascertain the majority, but that the selectmen arrived at this conclusion in a different way.

A question was then made to the committee, whether they could go behind this record, and receive evidence as to the whole number of ballots. On this point the committee were entirely satisfied, that, as the record wholly failed to make any statement respecting the whole number of ballots, it was perfectly proper to supply this important deficiency by evidence. The committee have already endeavored to state, in one of their reports respecting the election in Braintree, their views of the true principles which protect a record. They would repeat briefly, that where a record is intelligible, consistent and clear, and where it contains all the material statements required by law, it is itself the best evidence, and is not to be controlled by inferior evidence. But where the record is inconsistent and ambiguous, or where it is deficient as to a material fact, there it is proper to receive evidence to explain the ambiguity, or to supply the deficiency.

The committee therefore went into evidence as to the whole number of ballots, and it was distinctly proved to them, by one of the selectmen of Wilbraham, and it was admitted by the sitting member, that ballots were cast as follows:—

There were one hundred and sixty ballots for Stephen Stebbins and John Carpenter, - - -	160
There were one hundred and forty-three ballots for Samuel B. Stebbins and Pliny Merrick, - - -	143
There were twenty-six single ballots for Stephen Stebbins only, - - - - - -	26

There was one single ballot for Samuel B. Stebbins, -	1
There was one single ballot for Jesse W. Rice, -	1
Making the whole number of ballots, - - -	331

From these facts, it is perfectly obvious, that the number of ballots necessary for a choice is 166; and as the name of John Carpenter was borne only on 160 ballots, he was not elected.

It is but just to the selectmen to give their own explanation of the manner in which the mistake occurred. They state that they were not acquainted with the provisions of the Revised Statutes on this subject; the circular issued to the towns from the secretary's office, to instruct the town officers in this particular, was accidentally prevented from reaching them until long after the election. They therefore proceeded in a manner formerly very prevalent; they added all the votes together, and as there were two persons to be chosen, they divided the whole sum by four and added one to ascertain the number necessary for a choice; and, calculated in this way, Mr. Carpenter was declared to be elected. But the illegality of this mode of computation is perfectly obvious.

The committee therefore report, that John Carpenter, Esq., is not entitled to a seat in this house."

This report was agreed to,[1] and the house refused, by a vote of 167 to 176, to issue a precept for a new election in Wilbraham.[2]

WARWICK.

Where a meeting was warned for three o'clock, in the afternoon, and the poll was closed in less than two hours, these circumstances were not considered sufficient, in the absence of a fraudulent intent, to invalidate the election.

THE committee on elections, to whom this case was referred, reported thereon as follows:—

[1] 62 J. H. 91, 111. [2] Same, 138.

"Ashbel Ward and others, inhabitants of Warwick, petition against the right of Lemuel Wheelock, Esq., to a seat in this house, on the following grounds:—

1. Because the meeting was warned for 3 o'clock.

2. Because the poll was not kept open two hours.

3. Because freedom of debate was suppressed by the selectmen, with the aid and countenance of the member elect.

4. Because in other respects the letter and the spirit of the laws and the constitution were violated.

A large mass of evidence was offered to the committee both by the petitioners and by the sitting member.

From this evidence it appeared to the committee, that the meeting was warned for three o'clock, P. M., and that the poll was not kept open so long as two hours. It also appeared that some persons who addressed the meeting were not able to express themselves so fully as they desired and intended to do. But there was no evidence whatever, that the selectmen interfered to check or prevent debate, or that any hindrance to a full and detailed expression of opinion arose from any other cause, than the excitement and consequent disorder of the meeting; which, as it seems to the committee, existed in an unfortunate and reprehensible degree.

There was no evidence of fraudulent intent, or of the reception of any illegal votes, or of the rejection of any legal vote, in consequence of anything that occurred, or from any cause whatever.

Under these circumstances, the committee do not see that there is any sufficient cause to vacate the seat of the sitting member, and they accordingly report, that the petitioners have leave to withdraw their petition."

This report was agreed to.[1]

[1] 62 J. H. 91, 111.

UPTON.

A meeting for the choice of representatives may be adjourned from the place where it was originally called to some other place.

It is competent for a town-meeting, after having voted not to send representatives, to adjourn to the next day, for the purpose of reconsidering that vote; and an election of representatives, effected at such adjourned meeting, without any further vote on the reconsideration, is valid.

An article in the warrant for calling the meeting for the choice of representatives, "to determine the number of representatives the town will choose to represent them, at the general court, to be held at Boston on the first Wednesday of January next," is sufficient to authorize the choice of representatives.

THE report in this case was as follows:—

"The committee on elections report, that Eliab Leland and others, inhabitants of Upton, petition against the right of Elijah Warren and Nahum W. Holbrook to seats as members of this house, on the ground of the illegality of the proceedings at their election; and particularly,

1. Because there was no article in the warrant for the meeting to elect representatives.

2. Because the poll was not opened at the time and place appointed by the selectmen for the meeting.

The parties were heard before the committee at several sittings, and a great amount of evidence was introduced on both sides.

From this evidence it appeared, that the warrant contained the following article; and no other respecting the election of representatives:—

'And also to determine the number of representatives said town will choose to represent them at the general court, to be held at Boston, on the first Wednesday of January next.'

The meeting was called 'to meet at the public meeting-house in said town, at ten o'clock in the forenoon.' The meeting was called to order in the meeting-house at eleven. Soon after, a motion prevailed to adjourn to Union Hall. This was a hall built and owned by individuals, about ten or twelve rods from the meeting-house. The town-meetings had been always held in the meeting-house, until the hall was

built, about one year ago. Since then the town-meetings had been held in Union Hall, and in all instances but one, by adjournment from the meeting-house. The reason for these adjournments was not very clear, but there was some indistinct evidence tending to show, that the objection to the use of the meeting-house arose from the injury caused by the town-meetings, and also some difficulty about warming it. It was proved that Union Hall was perfectly convenient for town-meetings.

At Union Hall, the polls were opened for governor, lieutenant-governor, and senators. A motion was made not to send representatives. The house was divided, and counted by the constable and one of the selectmen. The constable returned 86 for and 85 against the motion; the selectman returned 83 for and 85 against. The chairman, uncertain what to do, delayed declaring the vote for some time, while the votes for governor were being given in; but finally declared the motion carried. The voting for governor went on, and between half-past three and four P. M. a motion prevailed to continue the poll open half an hour longer. Before the half hour expired, a motion 'to adjourn to ten o'clock the next day, for the purpose of reconsidering the vote not to send representatives,' was made, and put, and carried. Some witnesses stated, that they heard the motion only as a motion to adjourn to the next day; but that they learnt the purpose of the adjournment immediately, by inquiry of those who stood near them.

The meeting being opened the next morning, the chairman asked if there were any objections to the meeting, as he wished them stated and considered then, if any there were. But no objections were made. The poll was opened, the votes were received, and the sitting members had a majority of the whole number of ballots cast. The vote was the largest ever known in the town. There was no evidence, and indeed no allegation, of any fraudulent intent or unfair practices, on either side.

The committee are not satisfied, that these circumstances constitute a sufficient reason for declaring the seats of the sit-

ting members vacant. And they therefore report, that the petitioners have leave to withdraw their petition."

The above report was agreed to.[1]

CASE OF ELIPHALET P. HARTSHORN, MEMBER FROM BOSTON.

Petition against an election, upon an understanding between the parties, allowed to be withdrawn.

THE committee on elections reported, "That Charles Partridge and others, inhabitants of Boston, petitioners against the right of Eliphalet P. Hartshorn to a seat in this house, appeared before the committee by their counsel, and stated, that, by an understanding between the parties, the petition was to be withdrawn.

The committee therefore report, That the request of the petitioners be granted, and that they have leave to withdraw their petition."

This report was agreed to.[2]

CASE OF WILLIAM C. BROWN, MEMBER FROM BOSTON.

Where a member, who had removed his residence from the town, for which he was elected, on the 18th of March preceding his election, and had removed back to the same on the 5th of October following, was elected as representative for such town, at the succeeding general election in November; it was held, that he had not been an inhabitant of the town for a year preceding his election.

THE election of William C. Brown, one of the members returned from the city of Boston, was controverted by Jotham B. Monroe and others, on the ground, that the member returned "was not an inhabitant of the city of Boston, which he was chosen to represent."

The committee on elections made the following report:—

"Many witnesses were called on the part of the petitioners.

[1] 62 J. H 91, 111. [2] Same, 82, 111.

From their testimony it appeared, that Mr. Brown is the publisher of a newspaper in Boston, and resided there until the 18th day of March last. On that day he gave up his house in Boston, and removed with his family to Chelsea, where he had hired a house. He took no lease of the house in Chelsea, but the person from whom he hired it,—who was the agent of absent owners,—testified that Mr. Brown hired the house on the understanding that he was to hold it for a year, unless the owners, on their return in May or June, should wish to sell it; but this, Mr. Brown denied. The agent of the Winnisimmet ferry testified, that he sold to Mr. Brown, in the middle of March last, a ticket giving to him and his family free passage over the ferry between Boston and Chelsea, for one year. It also appeared, that Mr. Brown left his house in Chelsea and returned to Boston, and hired a house there, into which he removed with his family, on the 5th of October last.

It also appeared, that Mr. Brown was assessed in May last in Chelsea, and paid his tax; and that he was not assessed last year in Boston.

The constitution (c. 1, § 3, article 3,) declares that 'every member of the house of representatives, for one year at least next preceding his election, shall have been an inhabitant of the town he shall be chosen to represent.'

And the committee are of opinion, upon the facts above recited, that this constitutional requirement is not complied with in the case of Mr. Brown.

The committee therefore report, that William C. Brown is not entitled to a seat in this house."

The report in this case was agreed to, and the member allowed his pay to that time.[1]

[1] 62 J. H. 112, 131.

ADJOURNMENT OF MEETING ON THE FOURTH MONDAY OF NOVEMBER.

The constitution does not admit of an adjournment of the second meeting for the choice of representatives, which it provides for being held on the fourth Monday of November, to a day beyond such fourth Monday.

Meetings for the choice of governor, lieutenant-governor, and senators, cannot be adjourned to a subsequent day.

THE justices of the supreme judicial court, having been requested by the house of representatives to give their opinion on the question, whether a meeting for the election of representatives, on the fourth Monday of November, could be adjourned to a succeeding day, addressed the following communication, in answer thereto, to the house:—

"The undersigned, the justices of the supreme judicial court, have taken into consideration the question proposed to them by the honorable house of representatives, in the following words, to wit: 'Does the constitution admit of an adjournment of the meeting for the choice of representatives, which it provides for being held on the fourth Monday of November, to a day beyond the said fourth Monday?' And in answer thereto they respectfully submit the following opinion:—

This question arises upon the amendment of the constitution, which was adopted in 1831. The leading object of that amendment was, to alter the time of the commencement of the political year, from May to January; and the probable practical result anticipated from that alteration was, that there would ordinarily be but one session of the legislature, instead of two, in each year. As incidental to this alteration, it became necessary to alter the time at which the annual elections should be held. The whole of the provision upon this subject is in the following words: 'The meeting for the choice of governor, lieutenant-governor, senators, and representatives, shall be held on the second Monday of November in every year, but meetings may be adjourned, if necessary for the choice of representatives, to the next day, and again to the next succeeding day, but no further. But in case a second

meeting shall be necessary for the choice of representatives, such meetings shall be held on the fourth Monday of the same month of November.'

From this provision it seems obvious, that it was not intended by the framers of the constitution, that there should be any adjournment of meetings, for voting for governor and senators; for although there is no express restriction of this power, yet there is such a restriction by a clear and necessary implication. The provision, after a direction that the meeting shall be held for several purposes, that it may be adjourned for one of those purposes, carries a clear implication that it cannot be adjourned for the other purposes. This is no otherwise important to the present question, than as it shews the understanding of the framers of the constitution, that towns had no authority, under their general organization as corporations, to adjourn meetings held for the purpose of these elections.

But the next clause is more explicit in directing that meetings may be adjourned, if necessary, for the choice of representatives to the next day, and again to the next succeeding day, but no further. Here is not only an implication, arising from the provision for a very special and limited power of adjournment, that a general power did not exist; but there are express words of restriction upon any other power of adjourning the meetings required to be held on the second Monday of November, for the choice of governor, lieutenant-governor, senators, and representatives.

Besides, if there were no restriction on the power of towns, to adjourn meetings for the choice of representatives, meetings might be continued by adjournments, quite up to the time of the meeting of the legislature. But we think it was the obvious policy of the constitution to require, that the representatives should be chosen at a certain fixed time, previous to the meeting of the legislature. The provision of the former constitution, c. 1, § 3, art. 5, was, that the members of the house of representatives should be chosen annually in the month of May, ten days at least before the last Wednesday in that month, which was the commencement of the political year.

This policy was not apparently intended to be changed by the amendment, but to be confirmed and carried into effect by other provisions, limiting the times within which representatives should be chosen. Considering, that in future there would be but one session of the legislature, within the year, commencing with the beginning of the political year, there was good reason for fixing a longer time than formerly between the choice of representatives, and their entrance upon their duties, to give them time for preparation. No such limit is fixed, unless it is done by the provisions cited.

Further, it seems manifest, that it was the intention of the framers of this part of the constitution, to provide for the choice of representatives, in a manner as uniform in point of time and mode of conducting elections, as the different modes of organization of the different municipal corporations, composed of cities, towns, and districts, would admit. At the time this amendment was adopted, provision had already been made, by the amendments of 1820, for the incorporation of cities. Boston had already been incorporated and organized as a city, and it was contemplated that other large towns would soon be thus organized. Salem and Lowell were thus organized, within a few years after. By the mode of conducting elections in cities, the polls are opened in wards, where the people give in their votes; certificates of these votes are to be thence transmitted by the ward officers, to the mayor and aldermen, by whom they are to be examined, the results ascertained, and the returns made. The meeting of the voters in wards, though admirably well devised and adapted to ensure order, regularity, celerity, and convenience in elections, is not a deliberative body for any purpose, and they are vested with no power to discuss or decide upon any question. They have, therefore, no power to adjourn; and, besides, as the votes are to be transmitted to a central body, in order to ascertain the result, it would be impossible for the citizens of any ward to know, at the close of the election, whether a choice of representatives had been made or not. Had they, therefore, the power of voting on any subject, they could not upon this.

From this view of the organization of cities, it is quite manifest, that meetings of the inhabitants could not be adjourned to complete the choice of representatives. In order, then, to provide, that the voters of cities might have a second opportunity to choose their representatives, it became necessary to make some provision for a second meeting; and when making such provision, we think it was the intention of the framers of the constitution, to make a uniform provision, applicable to towns and districts, as well as to cities; fixing a day for the second meeting, as they had already fixed a day for the first, beyond which, if either corporation failed of choosing their representatives, none could be chosen.

But another and a principal ground of argument is found in the difference of the provisions, in regard to the first and second meeting. The provision in regard to the meeting on the second Monday of November is, that for the choice of representatives, the meeting may be adjourned to the next, and again to the next succeeding day, but no further. This, for reasons already adduced, we think, excludes a general or incidental power of adjournment, and limits the power of adjournment, to the precise cases in which the power is given. But the provision in regard to the second meeting is, that if a second meeting is necessary, it shall be held on the fourth Monday of the same month of November, without any provision for adjournment. It is true there are no negative words, such as 'and not afterwards,' or anything equivalent. But it being manifest, that no general or incidental power of adjournment for the purpose of choosing representatives was understood to exist; considering that when it was intended to confer a limited power of adjournment, it was given in express terms; the fact that no express power was given for adjourning the second meeting carries with it a strong implication, that none was intended to be conferred.

And there appears to be good reason for this distinction. By the organization of towns, (some very large,) all the voters must meet together at one place; at the first meeting they have many other elections to conduct; they meet as a deliber-

ative body, and may discuss questions and pass votes upon various subjects, especially upon the question whether they will send representatives, and how many; they may have several successive ballotings at the same meeting, until they make a choice. This great amount and pressure of business may prevent a town from completing their choice of representatives on the first day, when by having a power to adjourn from day to day, so as if necessary to extend to the third day, the election will be completed without the necessity of calling a second meeting. But when a second meeting is called at the interval of two weeks, the case is of quite a different character. The single purpose is to choose representatives. The voters have all had time and opportunity to consult and deliberate, and mature their opinion respecting candidates. Under these circumstances they will be likely to come prepared for a decisive ballot. Besides, by fixing the fourth Monday of November as the last day upon which representatives for the ensuing political year can be elected, the policy of the constitution is carried out, that the election of representatives shall be closed, both theoretically and practically, on a fixed day, by a rule affecting alike the cities, towns and districts of the commonwealth. It was intended, we think, that each town should elect representatives according to its own judgment, and its own views of fitness and expediency in respect to public interests, without regard to the elections made in other towns, and without waiting till the elections are necessarily closed in other municipal corporations, as it might do if no day were definitely fixed. This policy of closing the representative elections on a given day throughout the commonwealth was apparent in the previous constitution, and we think it was intended to be preserved in the amendment; and if this was so, the fourth Monday of November must be considered as such day.

These considerations are perhaps not entitled to great weight; they would be entitled to none, against a plain provision. But they may deserve some consideration as indicat-

ing the general intent of the framers of the constitution, and in expounding its provisions when the language is not explicit.

But we rely mainly on the terms of the amendment itself; we there find, that when a power of adjournment is intended to be conferred, it is given in a very precise form, and to a very limited extent. Then, when it provides in the same clause, that, in case a second meeting is necessary, it shall be held on a given day, without providing for any adjournment, the natural and reasonable construction is, that it shall be held and closed, and the election finished, on that day.

A question occurred to us on the clause, 'but meetings may be adjourned, if necessary, for the choice of representatives, to the next day,' &c., whether the term 'meetings' could not be applied to all meetings to be held for the choice of representatives, as well those provided for in the subsequent part of the amendment, to be held on the fourth Monday of November, as to those previously provided for to be held on the second Monday of November. Considering this question with some care, we are of opinion, that such a construction would be forced and unnatural, and could not have been the true intent of the framers of this amendment. The word 'meetings' in this place follows immediately after the provision, in the two preceding lines, for meetings for the choice of governor, lieutenant-governor, senators and representatives, on the second Monday of November, and then directs that meetings may be adjourned for one of these purposes; and the first and most obvious reference is to 'such meetings,' or 'those meetings.' And further, the word 'next day' has some significance, it is a relative word, the question is 'next to what?' and the natural answer seems to be, next to the second Monday of November, being the day last before mentioned. Then again the next sentence begins with the disjunctive conjunction 'but,' and introduces a new provision, in case the former meetings, with their two adjournments, shall have proved unsuccessful, for a distinct and independent original meeting, to be afterwards held. We think, therefore, the true construction is, that the

term 'meetings,' in the clause providing for adjournments, applies to first meetings for the choice of governor, senators, and representatives, and does not extend to the second meetings afterwards directed to be held on the fourth Monday of November, for the choice of representatives only.

These are some of the principal grounds and reasons for the opinion, which we have now the honor to submit. That opinion is, that the constitution does not admit of an adjournment of the meeting for the choice of representatives, which it provides for being held on the fourth Monday of November, to a day beyond the said fourth Monday.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE,
CHARLES A. DEWEY.

Boston, 17*th Feb.*, 1840."

PAYMENT OF A TAX BY PERSONS SEVENTY YEARS OF AGE.

An order was adopted in the house[1] on the 10th of March, for taking the opinion of the justices of the supreme judicial court, upon the following questions:—

"Has every male inhabitant of this commonwealth, who is more than seventy years of age, and has resided within the state one year, and within the town in which he may claim a right to vote, six months next preceding any election of town, county, or state officers, &c., but has not been taxed within two years next preceding such election, a right to vote at such elections?

If the discretion of the assessors is to be applied in reference to those who are above seventy years of age, and are possessed of property, what is the rule which is to govern in those cases, where such persons would be liable to pay poll taxes, were it not for the limits of age, assigned by the first section of the seventh chapter of the Revised Statutes?"

[1] 62 J. H. 322.

This order was afterwards reconsidered, and the questions therein referred to a special committee, composed of the committees on the judiciary and on probate and chancery,[1] who reported thereon[2] the following opinion:—

"We think that persons more than seventy years of age, being destitute of taxable property, who would be assessed a poll tax, but for the exemption by reason of age, are entitled to vote in the election referred to, being otherwise qualified. But, persons more than seventy years of age, having taxable property, which the assessors in their discretion exempt from taxation, by reason of age, infirmity or poverty, are not entitled to vote in such elections."

1841.

COMMITTEE ON ELECTIONS.

Messrs. *John C. Park*, of Boston, *Nathan Durfee*, of Fall River, *Amos Spaulding*, of Carlisle, *Rufus S. Paine*, of West Springfield, *Cyrus Faulkner*, of Millbury, *Samuel C. Carter*, of Amherst, *William S. Bartlett*, of Plymouth.

PAYMENT OF STATE OR COUNTY TAX.

In towns where no state or county tax is assessed, the inhabitants are nevertheless entitled to vote in the election of state officers.

The committee on the judiciary having been instructed,[3] by an order of the house, "to inquire whether any, and, if any, what further legislation is necessary to secure the right of suffrage to citizens residing in towns where no state or county tax is assessed," reported thereon as follows:—

[1] 63 J. H. 345. [2] Same, 420. [3] Same, 66.

"That they have examined this subject with the care which its importance demanded, and they have now the honor to lay before the house the result at which they have arrived.

The order directs the committee to inquire, whether any further 'legislation' upon this subject is necessary; and if they were confined to a literal construction of the order, it would be sufficient for them to report, that the right of suffrage, being secured to the citizens of the commonwealth by the constitution, no legislation could remedy any infringement of that right—nothing short of an amendment of the constitution.

But the committee believed, that it was the intention of the mover, and in accordance with the wishes of the house, that they should take a larger view of the question, and state their opinion on the several cases, which gave rise to the order of inquiry, and of the necessity of any amendment of the constitution.

There are four towns at least in the commonwealth, in which no state or county tax has been assessed within two years preceding the recent election, viz.: Edgartown, Tisbury, and Chilmark, in the county of Dukes county, and Chelsea, in the county of Suffolk. And it has been questioned and debated, whether the inhabitants of these towns were not, therefore, deprived of the elective franchise. The committee believe, that they are entitled to vote and to be represented, for the reasons following:—

The last clause of the third article of the amendments of the constitution contains the following provision: 'Every citizen, who shall be, by law, exempted from taxation, and who shall be, in all other respects, qualified as above mentioned, shall have a right to vote,' &c.

The inhabitants of the towns in the county of Dukes county contend, that they were exempted by law from taxation. And it appears, that they were required by law to provide a fire-proof building for keeping the county records, and that a sum sufficient for that purpose was accordingly raised by taxation; but by a resolve of the legislature of April 1, 1839, duly approved, they were authorized, instead thereof, to provide fire-

proof safes, and to appropriate the remainder of the money to defray the contingent expenses of the county. The difference in the cost of the articles, which they were first required to purchase, and those which they were authorized afterwards to substitute for them, has left a sufficient sum in the treasury to meet the ordinary wants of the county. And the committee are therefore of opinion, that they were by law exempted from taxation, and were, on this ground, entitled to vote.

In regard to the town of Chelsea, the 14th chapter of the Revised Statutes, section 34, contains this provision: 'In the assessment of county taxes, for the county of Suffolk, the town of Chelsea shall not be taxed for county purposes.' The committee are therefore of opinion, that the inhabitants of that town were also by law exempted from taxation, and were and are entitled to vote, and to be represented under this clause of the constitution.

And the committee would beg leave to express the opinion, generally, that, where no state or county tax has been assessed upon a town, it would be equivalent to an exemption by law from taxation, and that the inhabitants of such town would consequently be entitled to vote.

The committee, therefore, report, that no further legislation is necessary, and they beg leave to be discharged from the further consideration of this subject."

This report was agreed to.[1]

RESIDENCE IN PLACES CEDED TO THE UNITED STATES.

Persons residing on lands purchased by, or ceded to, the United States, for navy yards, arsenals, &c., in this commonwealth, the state only reserving concurrent jurisdiction, as to the service of process therein, are not liable to taxation, and do not by such residence acquire any elective franchise, legal settlement, or right to the benefit of common schools, as inhabitants of the towns in which such territory is situated.

THE following opinion was given by the justices of the supreme judicial court, in answer to certain questions proposed

[1] 62 J. H. 102, 360.

to them by the house of representatives, touching the rights acquired by a residence on territory ceded by the state to the United States.

"The undersigned, justices of the supreme judicial court, have taken into consideration the several questions hereafter stated, upon which the honorable house of representatives has requested their opinion, by an order passed 6th March, 1841; which questions are of the following tenor:—

1. Are persons, residing on lands purchased by, or ceded to, the United States, for navy-yards, arsenals, dock-yards, forts, light-houses, hospitals, and armories, in this commonwealth, entitled to the benefit of the state common schools for their children, in the towns where such lands are located?

2. Does such residence exempt such persons from being assessed for their poll or estates, in the towns in which such places are located?

3. Will such residence, for the requisite length of time, give such persons, or their children, a legal inhabitancy in such towns, or in the commonwealth?

4. Are persons so residing entitled to the elective franchise in such towns?

Upon these questions the undersigned ask leave to submit the following opinion:—

It is hardly practicable to give a general answer, applicable to all the cases proposed in the first question; because the question may depend somewhat upon the construction of the different acts, by which jurisdiction has been ceded by this commonwealth to the United States for various purposes, and these acts differ essentially from each other. For instance, in two acts, comparatively recent, one passed 4th March, 1826, ceding to the United States a tract of land for the erection of a marine hospital at Chelsea, there is an express proviso and reservation, that all persons who may remove on said territory shall be deemed inhabitants of Chelsea, to enjoy the privileges and be subject to the duties of such inhabitants, except that they shall not be liable to serve on juries, or do military duty. Whereas, in the act passed Feb. 20th, 1828, ceding jurisdiction

to the United States of another tract in Chelsea, for the purpose of building a naval hospital, there is no such provision, and no reservation, except that common to all those acts, of concurrent jurisdiction for the service of civil and criminal process. So, different regulations are contained in several acts ceding jurisdiction to the United States, for the purpose of building light-houses, beacons, break-waters, and the like. Perhaps a fuller and more careful analysis would show, that when jurisdiction is ceded for the erection of forts, dock-yards, and works of a purely military and naval character, connected with the defence of the country and operations of war, the exclusive jurisdiction is granted to the United States, with the single exception of service of process issuing under the authority of the state within which such territory is; whereas, if the object of the cession of jurisdiction is of a civil nature, the assent of the state is limited and qualified by such reservations, as the legislature ceding the jurisdiction may think expedient for the safety and convenience of their own citizens.

But we presume, from the nature and form of the questions, that it was not the intention of the honorable house to request an opinion upon all the various acts of cession, by which jurisdiction has been granted to the United States, from the establishment of the general government; these are numerous and various, and an examination of them would require much time and labor. We consider that the questions were intended to apply to the larger and more important establishments, as the navy-yard in Charlestown, and the arsenal in Springfield.

The constitution of the United States, art. 1, §. 8, provides, that congress shall have power to exercise exclusive legislation, in all cases whatsoever, over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The jurisdiction in such cases is put upon the same ground, as that of the district ceded to the United States for the seat of government; and, unless the consent of the several states is expressly made conditional or limited by the act of cession, the exclusive power of legisla-

tion implies an exclusive jurisdiction; because the laws of the several states no longer operate within those districts.

The earlier and more important acts of this commonwealth on this subject were that of 1798, c. 13, granting jurisdiction to the United States of Castle Island and Governor's Island in the harbor of Boston, and a tract of six hundred and forty acres in Springfield, for the purpose of erecting forts, magazines, arsenals, dock-yards, and other needful buildings; and that of 1800, c. 26, granting the consent of the commonwealth to the United States, to purchase a tract of land in Charlestown, described, for the purpose of a navy or dock-yard, or both, and erecting magazines, arsenals, and other needful buildings. The territory of the navy-yard was somewhat extended by the act of 1825, c. 8, but upon the same terms specified in the original act.

The only limitation or proviso in the act of 1800, granting the consent of this commonwealth to the purchase of a tract of land in Charlestown for a navy-yard and other purposes, is this,—that the consent of the state is granted upon the express condition, that this commonwealth shall retain a concurrent jurisdiction with the United States in and over the tract of land aforesaid, so far as that all civil, and such criminal process as may issue under the authority of this commonwealth, against any person or persons charged with crimes committed without the said tract, may be executed therein in the same way and manner, as though such consent had not been granted. The same provision is contained in the act of 1798, c. 13, ceding jurisdiction over Castle Island for a fort, and over a tract of land in Springfield, for an armory and arsenal.

These provisions have been the subject of judicial consideration and decision in several cases. The leading cases on this subject in this state are *Commonwealth* v. *Clary*, 8 Mass. 72, and *Mitchell* v. *Tibbetts*, 17 Pick. 298. Without stating these cases particularly, we are of opinion, that in cases where the general consent of the commonwealth is given to the purchase of territory by the United States, for forts and dock-yards, and where there is no other condition or reservation in the act

granting such consent, but that of a concurrent jurisdiction of the state for the service of civil process, and criminal process against persons charged with crime committed out of such territory, the government of the United States have the sole and exclusive jurisdiction over such territory, for all purposes of legislation and jurisprudence, with the single exception expressed; and consequently, that no persons are amenable to the laws of the commonwealth for crimes and offences committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns, within which such territory is situated.

What would be the effect, were other conditions annexed to the act, granting the consent of the commonwealth to the purchase of territory, and in terms reserving the full concurrent jurisdiction of the state: whether the consent would be deemed legally inoperative, or whether the condition and reservation would be void, or whether the jurisdiction would be deemed concurrent, we give no opinion.

We proceed to apply the opinion thus stated to the questions specifically proposed by the honorable house of representatives.

1. We are of opinion, that persons residing on lands purchased by, or ceded to, the United States for navy-yards, forts, and arsenals, where there is no other reservation of jurisdiction to the state, than that above mentioned, are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated.

2. We are of opinion, that such residence does exempt such persons from being assessed for their polls and estates to state, county, and town taxes, in the towns in which such places are situated.

3. Understanding as we do, by the terms of this question, that the term 'legal inhabitancy,' is used synonymously with 'legal settlement,' for the purpose of receiving support under the laws of the commonwealth for the relief of the poor, we are of opinion, that such residence, for any length of time, will

not give such persons or their children a legal inhabitancy in such town.

4. We are also of opinion, that persons residing on such territory do not thereby acquire any elective franchise, as inhabitants of the towns in which such territory is situated.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE,
CHARLES A. DEWEY.

Boston, March 10, 1841."

1842.

COMMITTEE ON ELECTIONS.

Messrs. *John C. Park*, of Boston, *William Parsons, Jr.*, of Gloucester, *Thomas Bowler*, of Lynn, *Anthony Shove*, of Dighton, *William Ide*, of Seekonk, *Job C. Stone*, of Shrewsbury, *Walter Hillman*, of Tisbury.

BELCHERTOWN.

If there are but three selectmen in a town, and one of them becomes incompetent to act, and a second is elected representative, the third may certify the election, and the member himself may sign the certificate, even after he has taken his seat, and his return has been controverted for want of a proper certificate.

It appeared by the report of the committee on elections, to whom the certificates of the members were referred, that the certificate from Belchertown was signed by only one of the three selectmen of that town. On inquiry of the member, the committee ascertained that one of the other two had removed from the town, and had thus become incompetent to certify;

and that the third was the member himself. Under these circumstances, the committee allowed the member to affix his signature to the certificate as selectman, with the date when he affixed it annexed, and recommended that the election be confirmed by the house.

The report was agreed to.[1]

PRINCETON.

If the inhabitants of a town vote, previous to balloting for a representative, to dispense with the check list, an election effected at such balloting is void.

The election in this town being controverted, on the ground, that, at the meeting when it took place, the inhabitants voted to dispense with the check list, the committee on elections reported thereon as follows:—

"The committee on elections, to whom was referred the petition of David Wilson and others, of Princeton, against the seat of Ebenezer Parker, the sitting member from that town, report, that having notified the parties, the only evidence offered in support of the petition was the record of the town clerk, which was as follows:—

'FOR REPRESENTATIVE TO THE GENERAL COURT.

The votes having been sorted and counted on the first ballot, it appeared that no person had a majority of all the votes given in. Said inhabitants then voted to dispense with the check list, and gave in their votes a second time, and the same being sorted and counted, were as follows:—For Ebenezer Parker, seventy-seven; Charles A. Myrick, forty-seven; John Myrick, twenty-four; Israel Everett, one; Enoch Brooks, one; John Brooks, one; and Mr. Ebenezer Parker was declared to be duly elected.'

The above town-record was admitted to be true.

[1] 64 J. H. 76, 77.

The committee recommend the adoption of the following order:—

Ordered, That the seat of Ebenezer Parker, returned as a member of this house, from Princeton, be and hereby is declared vacant."

This report was agreed to.[1]

The committee on elections also reported certain orders for the purpose of causing a prosecution to be instituted, for the illegal conduct of the town and the selectmen, in dispensing with the check list, which orders were indefinitely postponed.[2] A motion was also made for a precept for a new election, which was refused by the house.[3] The member was allowed his pay.[4]

CHATHAM.

Where the selectmen, in the honest belief that illegal votes had been received, overturned the box and scattered the votes, and commenced the balloting anew; it was held, that this was not such an irregularity as would avoid an election subsequently effected.

THE committee on elections, to whom the petition of Thomas Smith and others, against the election of Ephraim Taylor, returned a member from Chatham, was referred, reported thereon as follows:—

"On the first day of election, after several votes had been received, two clergymen deposited their ballots, their names being on the check list; but they were challenged on the spot, and admitted that they had never been taxed; a discussion ensued as to what was to be done, illegal votes having been admitted, and the chairman of the selectmen removed all the votes which had been given in, and called upon the voters to bring in their ballots anew.

At this ballot no choice was effected. When this was known a motion was made to adjourn to the next day; but the chairman declined putting it then to the meeting, as the votes for

[1] 64 J. H. 76, 89. [2] Same, 76, 92, 97. [3] Same, 89, 97. [4] Same, 90, 96.

governor, &c., were not yet sealed up. The warrant for the meeting contained an item of town business. The voters therefore proceeded to choose a moderator and transact the town business; after the conclusion of which, the member, Mr. Taylor, declares that the motion for an adjournment was put and carried. The petitioners, in their memorial, declare that it was not put. Neither party offered any testimony. The certificate of the sitting member, with the signature of the selectmen, bears date the 9th. On the 9th, Mr. Taylor was elected at the first ballot.

Mr. Taylor, the sitting member, was chairman of the selectmen, but was not a candidate the first day. On the first day one hundred and forty-four voters answered to their names; on the second day one hundred and seventy-one citizens voted; and Mr. Taylor then had one hundred and nine votes.

The committee are aware that the emptying of the ballot-box was an irregularity; and some citizens might have voted and gone home. In fact, the petitioners alleged that such was the case, but offered no proof of the fact; still the committee see plainly, that the selectmen had discovered that illegal votes had been thrown, and being anxious to avoid future embarrassments, adopted a course not objected to at the time, and which was undoubtedly based upon honest and conscientious motives.

As there was no proof offered that any voter had voted and retired; as there was no choice among three candidates, upon the other trial on the same day; and as a new candidate was set up and elected the next day, when there were twenty-seven more voters present; the committee believe that the will of the majority of the town is fairly, legally and constitutionally represented by the sitting member, and therefore recommend that the petitioners have leave to withdraw their petition."

This report was recommitted to the committee on elections,[1] who made a second report, as follows: —

" On the 8th of November, the voters assembled and began voting about two o'clock. Ephraim Taylor, as chairman of

[1] 64 J. H. 76, 92.

the selectmen, commenced calling the voting list. When he had finished the list, he announced that any legal voter might now come forward and vote. Upon this, many came forward and voted. After they ceased to present themselves, the chairman announced that, by request, he had added the names of the four clergymen of the town, and called their names. Two of the clergymen came forward and voted. Neither of them was a legal voter, and their votes were challenged on the spot. Much discussion arose, and the chairman maintained, that a clergyman could vote without the constitutional qualifications, until the Revised Statutes were produced and the constitution read. He then pronounced all they had done wrong, and immediately overturned the hats, and called upon the voters to bring in their ballots again. They began calling the list of voters again, and the polls were kept open this second time about sixty-five minutes, that is, until near sunset. All the names were again called over, and, at the close, all were invited to come forward and vote. It was proved that ten persons, who voted before the hats were overturned, did not vote the second time. On counting the votes, it was found that there was no choice; the votes stood as follows:—T. H. had sixty-two votes; J. S. had fifty-four votes; S. T. had twenty-eight votes. Thus far, all the testimony agreed. But here one class of witnesses testified, that the chairman stated that he had a right to adjourn the meeting without putting it to vote; and, after consulting the other selectmen, as to the hour to which they should adjourn, he, without any motion made by any one, declared the meeting adjourned to the next day at one. Another class of witnesses were as confident, that they heard a motion made to adjourn till the morrow; that the chairman of the selectmen replied, that as the votes for governor, &c., were not yet sealed up, they could not adjourn; if they did, their whole election would be vitiated, and that, as there was an item of town's business in the warrant, they must choose a moderator and proceed with that business.

All the witnesses agreed, that a moderator was then chosen, and the town business transacted; that their town-meeting

under the moderator never was adjourned, and, after the business was completed, the people dropped off, leaving only the two selectmen and town clerk at the table, one other selectman and Captain Howes in the room, and a boy or two. The town clerk and the other selectman, Mr. Doane, both testified that, as Mr. Taylor, the chairman, finished signing his name to the return of governor's votes, he threw down his pen, saying, what shall we do about the motion to adjourn? that they both held up their hands as voting to adjourn, and that the chairman declared it to be a vote.

On the other hand, Mr. Nickerson, who was the other selectman, and Mr. Howes, who was the opposing candidate to Taylor the next day, both were in the hall at that time, and both testified, that they knew nothing of any such adjournment. Many testified that they did not know of any adjournment except by the chairman of the selectmen, before the choosing of the moderator, but all these testified that they left the hall before the lights were brought in; whereas the selectmen signed and sealed up their votes by candle light.

On the next day the voters assembled, and dropping two of the candidates, a new one was run, being the chairman of the selectmen, who was not a candidate the first day. The votes were, whole number, 171; Ephraim Taylor had 109; Thomas Howes, 55; scattering, 7. The town record of the 8th contained an entry that the meeting was adjourned to the ninth.

Upon the above statement of facts and evidence, the petitioners contended:—

First. That the hats containing the votes were illegally overturned and scattered.

Second. That if they were not illegally overturned, the next bringing in of the votes was the first balloting; and that the polls on that occasion were not kept open for two hours.

Third. That there was no legal adjournment of the town-meeting from the 8th to the 9th, and that, therefore, all proceedings on the 9th were null and void.

On the other hand, the counsel for the sitting member con-

tended, that although there was irregularity in the proceedings on the first day, there was no fraud; and that in fact the irregularity was to avoid illegality, and was the *bona fide* act of the chairman, to avoid receiving illegal votes. He further contended, that the meeting was legally adjourned, and that the evidence of the record was on that point conclusive.

The committee were of opinion, that, at the first balloting, illegal votes having been thrown in, the selectmen who overturned the box did it with the best motives, and not with any fraudulent intent. At the second balloting, there was no choice, but the polls were kept open to sunset, as long as the law allowed.

The committee were fully satisfied, that the record of the adjournment was conclusive upon that point; but, if it were not, they were satisfied that there was an adjournment in form, after the mass of the people had left the hall.

As twenty-seven more persons voted on the 9th than on the 8th, and as Mr. Taylor had a large and decided majority, the committee are of opinion, that the will of the town is fully represented in the sitting member, and therefore recommend, that the petitioners have leave to withdraw their petition."

This report was agreed to.[1]

TEWKSBURY.

Where it appeared, upon examining the record of a town-meeting, that the whole number of votes recorded exceeded the aggregate of the votes for the several candidates, (one member only being voted for,) evidence was received to explain the discrepancy, and to show that the record was erroneous.

The question in this case arose upon an inquiry instituted by the house into the correctness of the return from Tewksbury.[2] It was referred to the committee on elections, and they reported thereon as follows:—

"The committee on elections, to whom was referred the

[1] 64 J. H. 239, 240, 256. [2] Same, 152.

orders directing them to inquire into the correctness of the return from Tewksbury, ask leave to report, that, it having been stated to them that the record of the November town-meeting stood as follows:—whole number of votes, 176; necessary for a choice, 84; the sitting member had 85. They directed a summons to the town clerk to appear before them with the record. On inspecting the record, it appeared, that the figures, as above set forth, were there recorded. But the committee, on adding together the votes given for the various candidates, found that the aggregate amount was 166, and not 176, and the clerk stated that the 7 in place of the 6 was a clerical error of his own. The committee therefore request that they may be discharged from the further consideration of the order."

The report was agreed to.[1]

METHUEN.

Residence.—Alienage.—Use of check list.—Payment of a tax.—Practice.—Illegal votes.

The election of Moses Merrill, returned a member from the town of Methuen, was controverted by S. L. Fogg and others, on the ground, that seven illegal votes were given therein for the sitting member, without which he would not have had a majority.

It appeared, by the town records, that at the meeting on the 8th of November, 1841, the whole number of votes given in for representative was 445; necessary for a choice, 223; Samuel H. Harris had 222; Moses Merrill, 221; scattering, 2; and there was no choice. The meeting was then dissolved, and at a subsequent meeting called and held on the fourth Monday, the whole number of votes given in for representative was 460; necessary to a choice, 231; Moses Merrill had 232; Samuel H. Harris had 227; scattering, 1; and Moses Merrill was declared to be elected.

[1] 64 J. H. 199.

The petitioners objected to the votes of Charles Barker, Joseph C. Emerson, Branch Gutterson, George W. Chadwick, Daniel P. Eaton, William White and Dudley Smith, all whose names were borne on the list of voters, and were found checked on the list which was used at the meeting.

The names of Emerson and Gutterson were inserted on the list as Joseph Emerson, and B. G. Gutterson. They were all proved by other evidence to have voted at the election, and for Moses Merrill.

Charles Barker's vote was objected to, on the ground, that he had not been an inhabitant of Methuen, at the time of the election, for six calendar months previous thereto. It appeared in evidence, that in the month of April, 1841, Barker was at work in a paper-mill in Methuen, and was taxed there as of the 1st of May following; that in June of the same year, he applied to another person in Methuen for employment in putting up machinery, saying that he wished to change his business; that he made an engagement accordingly, by which, after visiting his friends in Fairhaven, for a few weeks, he agreed to return on being informed by letter, that his employer was ready for him; and that he was written to for the purpose, and came to Methuen, about a fortnight before the election. He was not employed, however, according to the agreement, on his return; but claimed damage for the breach of contract, and was to be employed afterwards, if the other party should want him.

The vote of George W. Chadwick was objected to on the same ground. From his own testimony it appeared, that he was twenty-eight years of age; that he then lived at Methuen, and had lived there twenty-seven years; that he owned a tenement; and had household furniture then there; that on the 8th of April, previous to the election, he went to Nashua, taking none of his furniture, and only what he wore, with him; that he returned on the 8th of May to Methuen, and staid at home a week; that he was at home again two or three days in June, and on the last of July or first of August, returned home permanently; that while at Nashua, he was at his

wife's father's, where he went at the request of his wife's mother, for a visit, but made a few shoes there in the house; that his intention, when he went, was to make a short visit, certainly to return in May; and that he paid no taxes and attended no town-meetings in Nashua.

The vote of Joseph Emerson was also objected to, on the ground of a want of residence. He testified, that in the fall of 1840, he was at work at Stephens's piano-forte factory in Methuen; that, business growing bad, he accepted an offer to go to Manchester and make two dozen bureaus; that he went there at first principally to carry another person, and when there, was persuaded to take the job above-mentioned; that he agreed to return when Stephens could give him employment, and had no intention of leaving Methuen permanently; that he received a letter from Stephens in February, 1841, informing him that he had employment for him, and inviting him to return, which he did in the month of March following. It appeared, also, that Emerson was twenty-three years old, and had paid his taxes every year in Methuen; that he had no family, but had a mother residing in Methuen; that when he went to Manchester, he carried his tools and clothes, but left his old clothes with his mother at Methuen; and that he voted in Manchester in March, 1841. When he left Methuen to go to Manchester, he told Stephens that he would come back at any time, when he would give him good encouragement. It was also in evidence, that Emerson was a member of a Methodist church in Methuen, and that when he went to Manchester, he received a letter of recommendation, which, it was testified to by one witness, an officer of the church in Methuen, was only asked for when the applicant intended to remain away permanently. Another witness, who was a member of the Methodist church in Boston, testified, that when a man belonging to a Methodist church leaves, intending to be gone some time, although finally to return, it is usual to take a certificate with him. When such a letter is taken, if the party presents it at any other church, he must bring back one from that other church, before he can be readmitted to fellowship.

The objection alleged against Daniel P. Eaton's vote was, that he was an alien by birth; in relation to which it appeared that his father, who was a citizen of the United States, as early as 1802, and previous thereto, went to Canada about the year 1818, where he died in 1836. His son, the voter, was born in Montreal, in 1818, about seven months after his parents went there. He had been married and been taxed there.

The vote of Branch Gutterson was also objected to, on the ground, that he was an alien born. The father of this voter was born in Methuen, and was then sixty-two years old; he resided in Methuen until he was seventeen years old, when he went to Haverhill to learn a trade, where he remained until he was twenty-one; he then worked in the vicinity until 1802, when he went to Nova Scotia. He lived in Nova Scotia twenty-three years, during which time he worked alternately, for seven or eight years, in Nova Scotia and the United States, and returned finally to Methuen in 1825, where he had since resided. Branch Gutterson, the voter, was born in the province of Nova Scotia, came with his father to Methuen in 1825, where he had since resided, and in June, 1841, was about twenty-one years of age.

William White, whose vote was called in question, on the ground of a want of residence, testified, that his family lived in Methuen, where he had lived almost all his life; that about three years previous, being advised to go to the sea-board for the health of himself and wife, he went accordingly to Salem; leaving some of his goods stored at Methuen, where he had previously kept house; that his health improved, and his wife grew worse, by the removal; that as soon as his wife could be moved, which was in January, 1840, he carried her back to Methuen, and boarded her there; that he went back to Salem, and boarded and worked there as a shoemaker, visiting his wife in Methuen, once in four or five weeks, until the 17th of May, 1841, when he left Salem and travelled with a circus company through the states and the British provinces, until the 9th of October preceding the election; that he had paid

three tax bills in Salem, and had voted there at two annual elections; and that if he had been at Salem in November, 1841, he should have voted there.

The vote of Dudley Smith being objected to on the same ground, he testified, that he had no family, and had lived in Methuen till the spring previous; that having no real estate in Methuen, and for two years having been out of business, he had been boarding at the tavern there; that having an offer of his board to go to Hampton Beach to tend bar, he went there accordingly, on the 6th or 7th of July, 1841, leaving his extra and thick clothing at Methuen, and declaring that he should return in a fortnight; that he staid longer, and might have remained still longer, but that tending bar at Hampton Beach, in the summer, was hard work.

The sitting member offered, and was allowed to give evidence, to prove, that four persons, namely, Luther Parker, Albert Fales, Nathaniel Mower, and Stephen W. Wise, who voted at the election against the respondent, were illegal voters.

Luther Parker, whose vote was questioned on the ground of a want of residence, had, for the twenty months previous to the hearing, worked in a saw mill at Methuen, being absent during that time about two months while the water was too low for working the mill. He had been taxed twice in Methuen. Twice in a year he went to Nashua to visit his wife and children, who kept house there.

Albert Fales, who was alleged not to have paid a tax within the time required by the constitution, testified, that he first came to Methuen eleven years before, and remained there until 1837, when he went to Lowell, and remained there and at New London in New Hampshire, away from Methuen, until the last or middle of December, 1840. He further testified, that he paid no tax in 1841, but that he paid a tax in Lowell in 1840. To contradict this last statement, the respondent introduced a certificate of the treasurer and collector of Lowell, sworn to by him, that no man, by the name of Fales, appeared to have been taxed to the city of Lowell for the year 1840.

In regard to Nathaniel Mower, whose vote was objected to on the ground of a want of residence in Methuen, it appeared, from his own evidence, that he had lived at Methuen since 1835, working at hatting; that he had been absent at times at Lowell, where he had a wife and children; that his wife kept house at Lowell, to the expenses of which he contributed about 50 or 60 dollars a year; that he visited his family once in four, five, or six weeks, remaining with them two or three days at a time; and that he had always paid taxes and voted in Methuen.

It appeared that Stephen H. Wise, whose vote was questioned on the ground of a want of residence, came from Hebron, N. H., to Methuen, in 1833, where he remained nearly six years, with occasional absences of a month or six weeks at a time. In November, 1838, he went to Danvers, and worked there until the spring of 1840. He was then absent at various places, in this state and New Hampshire, until the 19th of April, 1841, when he returned to Methuen, taking with him his property from Danvers. He remained in Methuen, and voted at the election in November, 1841.

The committee on elections, before giving their opinion to the house, as to the qualifications of the several voters who were objected to on the one side and on the other, presented their views, preliminary thereto, as follows :—

"Joseph C. Emerson voted in Methuen, when there is no such name on the list, and Joseph Emerson's name is checked, and there are other similar cases. On this, the question arose before the committee, whether a person, otherwise a legal voter, having all the requisites prescribed in the constitution, became an illegal voter, by not being able to find his name on the check list.

And on this point the committee believe, that the whole law regulating the forms and proceedings at elections is merely directory, and can not deprive a voter of rights which he holds under the constitution; that if, for instance, Joseph C. Emerson was a legal voter in Methuen, was twenty-one years old, had lived in Massachussetts one year, and in Me-

thuen six calendar months, and had paid a tax legally assessed within two years, the selectmen had a right to receive his vote, though his name could not be found on the check list.

The committee were obliged to establish in the committee-room certain principles of the admissibility of testimony, which they think in accordanee with the law of the land. But as all their doings are subject to the supervision of the house, they feel it a duty to suggest upon what principles they acted.

1. They allowed either party to prove how a person voted, and that he did vote, either by the oath of the voter himself, or of some other person who could verify the fact.

2. They refused to hear testimony of the declarations of a voter that he voted, or for whom he voted, unless where the voter himself had been called and declined answering for fear of criminating himself.

3. They allowed proof from either party, by the voter or *aliunde*, as to any fact showing residence or removal, not requiring the voter to be first examined on this point.

4. They freely admitted testimony of the voter's statements respecting his intentions, motives, &c., bearing upon his removals from place to place, because his intent is the gist of the matter, and can be gathered as much from his sayings at the time, as his doings."

The committee, then, applying to the several cases, the principles relating to the law of domicil, established by the supreme judicial court in the cases of *Sears*, v. *Boston*, 1. Met. 250, *Thorndike* v. *Boston*, 1. Met. 245, *Lincoln* v. *Hapgood*, 11 Mass. 350, and *Jennison*, v. *Hapgood*, 10 Pick. 77, reported, that in their opinion, George W. Chadwick, Joseph Emerson, and Dudley Smith, objected to by the petitioners, and Luther Parker, Nathaniel Mower, and Stephen H. Wise, objected to by the sitting member, were duly qualified as to residence, and their votes properly received; and that Charles Barker and William White, objected to by the petitioners, were not duly qualified as to residence, and their votes ought to have been rejected.

They also reported, that Daniel P. Eaton and Branch Gutterson, objected to by the petitioners as aliens, were to be con-

sidered as citizens of the United States, although born in a foreign country, within the express provisions of the act of congress of the 14th of April, 1802, relative to the children of persons who then were or had been citizens of the United States.

The committee further reported, that they were satisfied by the evidence, that Albert Fales, objected to by the sitting member, had not paid a tax legally assessed upon him within two years, and that his vote ought therefore to have been rejected.

The committee having rejected two votes in favor of the sitting member, and one vote against him, recommended that the petitioners have leave to withdraw their petition.

The report, concluding as above, was read and rejected by the house; who, thus, in effect, confirmed the election, without adopting the reasoning or conclusions of the committee.[1]

CASE OF FRANCIS J. OLIVER, MEMBER FROM BOSTON.

At the adjourned session, in September, Mr. Francis J. Oliver, one of the members returned from the city of Boston, appeared for the first time, and was qualified and took his seat. Immediately afterwards, a committee was appointed, (the committee on elections having been discharged with the other committees,) to inquire into Mr. Oliver's right to his seat.[2] The committee reported, in a day or two, that they had made some progress in the inquiry, but not having been able to investigate the subject, so far as to arrive at a correct conclusion in the premises, they asked to be discharged from the further consideration of the subject. The report was agreed to.[3]

[1] 64 J. H. 123, 172, 204, 255. [2] Same, 342. [3] Same, 352.

COLERAINE.

Removal from the town, for which one is elected, to another town within the state, is no disqualification.

At the adjourned session, in September, a petition was received against the right of the member from Coleraine to hold his seat, and was referred to the committee on the subject of Mr. Oliver's seat.[1] The committee reported as follows:—

"Mr. Hillman (the member) removed from Coleraine to Charlemont, about the middle of April last, and is now a resident of the latter place. The question raised depends entirely upon the construction put upon the third section of the third article of the constitution of this commonwealth, upon which the committee are divided in opinion. The committee, however, found, on looking into the book of controverted elections, that a similar case was decided in 1787 (*ante*, 23) by the house, in favor of the sitting member. They therefore report, that said Hillman is entitled to his seat."

This report was agreed to.[2]

STUDENTS AT COLLEGES.

The undergraduates of a college or other literary institution, residing in the town where the same is established, for the purpose merely of pursuing their studies, and with the intention of returning to their homes, whenever their connection with such institution shall be dissolved or severed, do not, by their residence in such town, become legally qualified voters therein.

A PETITION of Keyes Danforth and others, complaining that students residing at Williams college for the purpose of education were allowed to vote in Williamstown, and praying the legislature to pass an act to prohibit such voting, having been presented and referred to the committee on the judiciary,[3] that committee made the following report thereon:—

"In the opinion of the committee, no further legislation is

[1] 64 J. H. 349. [2] Same, 353. [3] Same, 63.

necessary, to prevent undergraduates of colleges from exercising the privilege of voting in the towns where those institutions are situated. The laws now in force are sufficient, if duly executed. No person is entitled to vote who has not resided within the state one year, and in the town where he claims such right, six calendar months next preceding the election; and he must have attained the age of twenty-one years, and have paid by himself, his parent, master or guardian, some state or county tax, which shall, within two years next preceding such election, have been assessed on him in some town or district within the commonwealth. The selectmen of the town are bound by law to make lists of all qualified voters, and not to receive the vote of any person whose name is not borne on such list. If any one knowing himself not to be legally qualified, shall wilfully give in a vote at an election, he shall forfeit a sum not exceeding one hundred dollars. If any one shall wilfully aid or abet any person not legally qualified, in voting or attempting to vote at any election, he shall forfeit a sum not exceeding fifty dollars; and if any selectman or other town officer shall wilfully neglect or refuse to perform any of the duties required of them respecting elections, they shall severally forfeit a sum not exceeding two hundred dollars. If an undergraduate of a college is a resident or inhabitant, within the meaning of the constitution, is of the required age, and has paid the tax assessed upon him as above, he is legally entitled to vote; and the committee are not aware of any power in the legislature to deprive him of this right, merely by reason of his being such undergraduate. He has the same right to employ himself in obtaining a literary education, as in learning or exercising a trade, an art, a profession or agricultural pursuits. But the requirements of the constitution and laws are not satisfied, by merely abiding or remaining within the commonwealth and town where the individual claims to vote. He must go there with the intent, *bona fide*, to make it his home—to obtain a domicil. If his home is in another state, or in another town in this state, and he is a sojourner for temporary purposes, merely, intending when those

purposes are accomplished, sooner or later, to leave the state or town and return home, he is not liable to the duties nor entitled to the privileges of a citizen of the town he sojourns in. This is a question of fact in each case, and the party, who avers that he has abandoned his domicil of origin and taken up a new one, is bound to prove it. In determining this question, his intention is of the utmost importance, and his acts and declarations are evidence for or against him. By our law a man cannot be an inhabitant of two towns at the same time; but he may be legally an inhabitant of one town, while residing for temporary purposes in another. If otherwise legally qualified to vote, he will have the right to vote in the former and not in the latter town. The right to vote, eligibility to office, and liability to taxes, in one town, are necessarily exclusive of the same rights and liabilities in all other towns. These rules, applicable to citizens of Massachusetts, apply with at least equal force to citizens of other states, who come here, not with the intention of remaining, but with that of returning to their native state, when the objects of their visit here are accomplished.

The committee, therefore, in conclusion, are of opinion, that those undergraduates who resort to a town where a college or other literary institution is situated, merely for the purpose of pursuing their studies, and with the intention of returning to their homes whenever their connection with the college shall be dissolved or severed, are not legally qualified voters in such town, and that their votes ought not to be received by the selectmen of the town.

The committee ask to be discharged from the further consideration of this subject."

This report having been received and read, it was ordered, that two thousand copies thereof be printed, and that the secretary of the commonwealth be directed to transmit a copy to each of the towns and cities in the commonwealth.[1] The report was afterwards agreed to.[2]

[1] 64 J. H. 110. [2] Same, 132.

1843.

COMMITTEE ON ELECTIONS.

Messrs. *John C. Park*, of Boston, *James Russell*, of West Cambridge, *Samuel H. Walley, Jr.*, of Roxbury, *Seth J. Thomas*, of Charlestown, *Ensign H. Kellogg*, of Pittsfield, *Lewis Williams*, of Easton, *Alexander Ingham*, of Middlefield.

On the 17th of February, the committee on elections, at the request of their chairman, were discharged from the further consideration of the elections in Bolton, Easthampton, Northborough, Lanesborough, Hawley, and Spencer, and the same were then referred to—

Messrs. *George Wheatland*, of Salem, *William Sawyer*, of Charlestown, *Samuel Greele*, of Boston, *Gamaliel Church*, of Westport, *Dexter Fay*, of Southborough, *Stephen L. White*, of Taunton, *Stephen Bates*, of Charlemont.

CASE OF THOMAS NASH, JR.

A person, who is not returned as a member, has no right to take a seat and act as such, even though he is duly elected, and ought to have been returned.

An election for the choice of representatives being held at the same time with an election for register of deeds, votes, bearing the names of persons not resident in the town, and with the words "for register of deeds" thereon, if deposited in the box appropriated for the reception of votes for representatives, are not, it seems, to be counted in making up the whole number of votes given in for representative.

On the assembling of the house, at the commencement of the session, in January, 1843, and before the organization, two persons, Thomas Nash, Jr., and Justus White, appeared and drew seats as members, each of them claiming to be elected and entitled to a seat, as the representative from the town of Whately, in the county of Franklin. Neither of them had

any certificate of his election from the selectmen, as required by law; but each of them had in his possession a copy of the record of the meeting, at which the inhabitants of Whately ballotted for representative, and was prepared with affidavits and other evidence to support his claim to a seat. Mr. Nash took and subscribed the oaths of office with the other members, and proceeded to act and vote as such. Mr. White was not qualified, and did not assume to act.

After three ineffectual ballotings for speaker, in which Mr. Nash was supposed to have voted, it was moved and seconded to adopt the following order[1]: —

"Ordered, That Thomas Nash, Jr., claiming a seat in this house as a representative from the town of Whately, be requested to state, whether he voted in the election of speaker, at the last ballot."

It being moved and seconded,[2] that this order lie upon the table, the question was taken on the motion, and it appeared, by the returns of monitors temporarily appointed for the purpose, that there were one hundred and seventy-three votes in the affirmative, including the vote of Mr. Nash, and one hundred and seventy-two in the negative.[3] Before declaring the vote, it was moved and seconded, that the vote of Mr. Nash be disallowed.[4] This motion was debated at great length, and the question thereon being taken by yeas and nays, was decided in the affirmative, by one hundred and seventy-seven yeas to one hundred and seventy-five nays.[5]

The vote was then declared in the negative, and the order was allowed to be withdrawn.[6]

It was thereupon moved and seconded, to adopt an order, declaring that neither of the claimants was entitled to a seat,

[1] 65 J. H. 5. [2] Same, 6. [3] Same, 7. [4] Same, 8.

[5] Same, 10. On this question, Mr. Nash, whose name was borne on a list of the qualified members prepared for the purpose by the secretary of the commonwealth, was called and voted in the negative. This was contrary to the rule of parliament, universally acknowledged, that even a member duly returned shall not vote on a question which concerns him personally, but shall withdraw from his seat, and from the house, when the question is stated. No one, however, objected to the vote of Mr. Nash; and the clerk presiding did not feel authorized to omit calling his name, unless by order of the house.

[6] 65 J. H. 11.

and prohibiting both from exercising the functions of members, until their claims could be investigated.

This order was so modified as to relate, separately, to each of the persons named in it, and adopted first as to Mr. White,[1] without a division, in the following terms:—

"Whereas, Justus White is here present, claiming to be a member of this house from the town of Whately, in the county of Franklin, but without the certificate of his election required by law; therefore,

Ordered, That the said White is not entitled to a seat in this house, and that he be prohibited from any of the rights of members therein, until his claim can be investigated by a committee and decided by the house, in the manner heretofore invariably practised in similar cases."

The question was then proposed on the adoption of the order, in the same terms, relating to Mr. Nash, and decided in the affirmative, by one hundred and seventy-seven yeas to one hundred and seventy-four nays.[2] On this occasion, when Mr. Nash's name was called, he did not answer. The house proceeded, on the next day, and completed their organization, by the choice of a speaker.

On the 12th of January, Mr. Nash petitioned the house,[3] representing that, at a meeting of the citizens of Whately, held on the 14th of November preceding, he was duly elected a representative therefrom in the general court; that the selectmen had refused him a certificate of his election, for want of which the house had refused him a seat; and praying the house to inquire into the matter, and if the fact of his election should appear, to allow him to take his seat as a member.

This petition was referred to the committee on elections, who reported thereon[4] as follows:—

"The committee commenced their investigation of the testimony in this case by observing, that, there being no certificate of election from Whately, in the hands of any person, the *prima facie* case is, that no person has been elected a representative from that town, and the full burden of proof to make

[1] 65 J. H. 12. [2] Same, 13. [3] Same, 32. [4] Same, 299.

out a case beyond reasonable doubt, is upon any one assuming to claim the seat.

The first evidence, which the committee found in the case, was the record of the town-meeting on the fourteenth of November, which goes directly to confirm the truth of the above *prima facie* case.

The record showed, that Thomas Nash, Jr. had 118 votes; Justus White, 117; Charles Williams, 1; Horace W. Taft, 1; and that it was declared 'no choice,' and that thereupon it was voted not to send.

The committee have, in all their investigations, endeavored to uphold the high and responsible office of selectmen, as it has existed in this commonwealth, and did exist before the constitution. The duty of a clerk is simply to record the acts and doings of the town, as declared by the selectmen.

Still the committee are of opinion, that if any fact is recorded in the town clerk's record, which is declared by any claimant to be untrue, it is lawful for that claimant to introduce evidence to show that his allegation is true.

In pursuance of this ruling, the claimant was permitted to introduce testimony to show facts which would contradict the record. Testimony was therefore introduced tending to show, that persons not entitled to vote voted at that election, and that some who were legal voters were refused a right to vote.

Testimony was further introduced tending to show, that the two scattering votes were thrown for persons not eligible, and that the same ought not to have been counted as ballots.

The committee submit to the house the evidence relative to illegal voting, and merely add their own conclusion, that they see no reason to reject any of the votes which were received. Neither do they find any reason, why the rejected vote was not properly refused; and as to all but one of these votes, the committee were unanimous. Upon that one, which was the vote of Abner Field, the house is respectfully referred to his own testimony. [See the counter report.]

In reference to the scattering votes, the committee observed, that if either of them had been counted, it would have pro-

duced the same result, viz., no choice. The claimant therefore assumed the burden of proof, to show that the vote for Horace W. Taft, and the vote for Charles Williams, were each and both of them for persons not eligible, and therefore ought not to have been counted.

There is positive testimony, that the vote for Taft, was thrown by a person who intended to vote for Justus White as representative, and who afterwards claimed a right to vote for White, and was refused. The committee saw plainly that the vote for Taft was a ballot under the statute, so far that it exhibits the wish of a voter adverse to the claimant, Mr. Nash.

The committee found contradictory testimony relative to the vote for Williams; whether it had or had not on it any writing tending to show that it was for a person ineligible,—and as a doubt remains in the minds of the committee, they are of opinion, that the claimant has not made out his case in this point, the burden of proof being upon him.

Although the committee reject the vote given for Taft, on the ground, that Mr. Wells testifies, that he deposited that vote for 'register of deeds,' and that he subsequently claimed to vote for representative, and was refused, as his name had been checked, when he deposited the ballot for Taft in the representative box; yet they are of the opinion, that the selectmen were bound to count the votes for Taft and Williams, in ascertaining the whole number of ballots; unless they had decided to allow Mr. Wells to rectify his mistake and vote for representative, in which case they should have rejected the vote cast for Taft.

The statute in relation to this matter is so clear, that it cannot be mistaken,—and as the present case is one in which the committee are called upon to set aside the record, upon the ground that the doings of the selectmen were incorrect,—it becomes the duty of the committee and the house to refer to the law, Rev. Stat. c. 4, § 13, which is as follows:—

'In order to determine the result of any election in this commonwealth, the whole number of persons, who voted at

such election, shall first be ascertained, by counting the whole number of separate ballots given in; and no person shall be deemed and declared to be elected, who shall not have received a majority of the whole number of ballots; and in all returns of elections, the whole number of ballots given in shall be distinctly stated; but blank pieces of paper shall not be counted as ballots.'

Again, c. 5, § 7, prescribes 'that the election of representatives shall be recorded in the town records, together with the whole number of votes given in, and the names of all the persons for whom they were given.'

It will be observed that nothing is said as to ineligible candidates, but a vote given for any person is to be recorded.

The practice in congress has been to count all ballots, and even blanks, in determining an election; but a practice has occasionally obtained in this house, in convention, of treating ballots for unconstitutional candidates as blanks. Your committee, however, are not aware that any member was ever returned to this house, or established in his seat here, by the rejection of ballots for ineligible candidates, which would, if counted, have changed the result.

In anticipation of the possibility of such a result, and in consequence of an order having been submitted to the committee on this subject by the house, it becomes important that this question should be brought distinctly before the house for their judgment; inasmuch, as although there are difficulties in the minds of the committee in this case, in consequence of the uncertainty as to the Williams vote, and owing to the vote of the town on the 14th, not to send, which vote might have been rescinded then or on the 28th; yet, after all, another and a very grave question is, will the house allow a person to take or hold a seat as a member, who has not a majority of the ballots cast by legal voters?

May not every legal voter, relying on the thirteenth section of the fourth chapter, say, that 'vote for whom I may, if I vote for any person, my ballot must be counted to determine the whole number of ballots.' And again, where there is

voting going on, at the same time, in three different boxes, may not a voter, by mistake, deposit the wrong ballot in the representative box? And then, though he is punished for his neglect, by failing to have his vote count affirmatively for his favorite candidate, will the house go further, and say that his ballot shall not be counted to ascertain the whole number of ballots? We think not.

The committee desire to present another view of this case, to which we have already alluded in part, which somewhat divests it of any embarrassment upon the subject of this count.

It cannot be doubted, that the selectmen are the competent authority to act and pass upon the votes during the continuance of the town-meeting. The selectmen, exercising their authority, declared to the town that there was no choice. No objection was made at the time to this declaration, and it is not pretended that there was any fraud, connivance, or intentional misconduct, in the selectmen, in this declaration.

The town, if they had seen proper, might have proceeded to another choice at that time; but on the contrary, a motion was immediately made, and deliberately carried, not to send a representative.

It will be observed, that all this took place at the meeting on the second Monday of November; and, by the statute, the town, or any ten voters of the town, might have asked for a meeting on the fourth Monday of the month, and it was not done.

The vote, therefore, 'not to send,' remains; and that deliberate act of the town, being an act within their power, and which they might have reversed, if they had chosen, on the fourth Monday, ought not to be reversed by the legislature, without full and conclusive and satisfactory evidence, that the people had already chosen some one to represent them; and that this result had been announced in the meeting; and therefore, that they had no right to vote not to send. The committee, therefore, recommend the adoption of the following order:—

Ordered, That Thomas Nash, Jr., the petitioner, have leave to withdraw his petition."

A counter report was also presented at the same time, signed by three members of the committee, (Messrs. *Thomas*, *Russell*, and *Williams*,) as follows:—

"The committee on elections have divided on the case of Thomas Nash, Jr., of Whately, and it becomes necessary for the undersigned to make their report:—

They do not present it as the minority report, but, in fact, as the majority report, in so far as the conclusion is concerned, namely, that Mr. Nash is entitled to a seat in this house. This conclusion they regard as the legitimate deduction from the votes taken in the committee, on the several points raised in the inquiry. No other conclusion can be fairly drawn from those votes, which are to the following effect, and establish, by a majority of the committee, these facts:—

1st. That all the votes given to Thomas Nash, Jr., the claiming member, namely, 118, are legal votes.

2nd. That Noah Dickinson and Asa Belden would have voted for Mr. Nash, if Porter Wells and Calvin Wells had been allowed to vote for Justus White, and that these two on both sides are balanced, and not to be counted either way.

3rd. That the votes of John Brown and Willard Belden, which were duly offered in town-meeting for Thomas Nash, Jr., and rejected by the selectmen, were unlawfully rejected, and ought to have been received and counted for Mr. Nash; the said Brown and Belden being qualified voters, and having taken all the preliminary steps to entitle them to vote.

4th. That Justus White, the opposing candidate to Mr. Nash, has shown no claim whatever to a seat in this house.

5th. That the vote for Horace W. Taft, of Sunderland, for register of deeds, ought not be counted. On these points the committee are agreed. This would make the whole number of votes 236: of which Thomas Nash had 118; Justus White had 117; 'Charles Williams of Deerfield, for register of deeds,' 1. On the exclusion of the vote for Charles Williams,

of Deerfield, for register of deeds, the vote in the committee was 3 to 3, the chairman not being present.

If the Charles Williams vote is excluded, which it ought to be, in the opinion of the undersigned, as well as the vote for Horace W. Taft, then Mr. Nash was elected.

But even if that vote is counted against Mr. Nash, still, as the undersigned view it, Mr. Nash is elected by excluding the vote of Abner Field, who voted against Mr. Nash, and who was not a legal voter. It was proved that Field voted for Justus White, and it was contended, on the part of Mr. Nash, that Field was not a legal voter. On this question the vote in the committee stood 3 to 3, the chairman being absent. But the chairman comes to the same conclusion, as we understand it, and which is in strict conformity to his own decision in the case of Methuen, reported at the last session of the legislature, that Field was not a legal voter, and hence his vote ought to be excluded. This would leave (even counting the Williams vote for register of deeds,) the following result:

Whole number of votes as counted by the selectmen,		237
Deduct the Horace W. Taft vote, - - -	1	
" Abner Field's illegal vote, - - -	1	
	—	2
Would leave, - - - - - - - -		235
Necessary to a choice, - - - - - -		118
Thomas Nash, Jr., has - - - - -		118
Justus White 117, less 1 by the illegal vote of Abner Field, - - - - - -		116
Charles Williams, for register of deeds, - -		1

Thus, by rejecting the Horace W. Taft vote, and the vote of Abner Field, in which a majority of the committee agree, it is in fact decided that Mr. Nash has a majority of all the legal votes given for representative, and such ought to be the conclusion of the report.

The only ground taken to obviate this conclusion, as we understand it, is, that after the votes were counted, and no

choice declared by the selectmen, the town voted not to send a representative to the general court the present year.

An answer to this is, that such a vote, taken after a ballot, cannot invalidate a choice, if any person had received, previous to such vote, a majority of the legal ballots for representative.

Any other conclusion would put it in the power of a minority, who should happen to remain in town-meeting, after the result of a ballot that showed a majority for a candidate, to set it aside by declaring no choice, and voting not to send.

An election, made after a vote not to send, is void, but a vote not to send cannot invalidate an election already made by a majority of the legal votes given for a representative.

This point was settled as early as 1787, in the case of the town of Paxton, (*ante*, 20,) and has never since been questioned in any decision. In that case the selectmen refused to give Hezekiah Ward a certificate of election, alleging that a meeting was held in that town for choice of representative, which was very thinly attended, at which it was voted to send a representative, and Mr. Ward was elected; that the said meeting was adjourned, and at the adjournment thereof, when a much larger number of the inhabitants was present, it was voted to reconsider the vote passed at the previous meeting; that Mr. Ward was present at said adjourned meeting, and was also informed of the reconsideration by one of the selectmen, but nevertheless claimed his seat.

Upon this state of facts, the petitioners had leave to withdraw, and Mr. Ward held his seat.

If, therefore, Mr. Nash had a majority of the votes cast for representative in the town of Whately, on the first ballot, no subsequent act of the town could deprive him of his seat.

The same point is settled in Mr. Fuller's case, in the town of Holland, (*ante*, 366). The town voted to send a representative, and a ballot was had. The selectmen declared no choice. Several other ballots were had without a choice; and then the town voted to reconsider the vote to send, and the meeting was dissolved. Mr. Fuller claimed his seat on the ground that he was chosen on the first ballot. The committee on elections

were satisfied that he did have such majority, and reported accordingly.

The chairman of the present committee on elections was also chairman of the committee in Mr. Fuller's case, and though he dissented from the report in his favor on another ground, viz.: that Mr. Fuller had obtained votes by the promise of a treat given to the voters, in the nature of a bribe, yet he "concurred with the majority in reference to all the facts stated in their report," and did not rely on the votes of reconsideration and not to send, as affecting the balloting which had previously been had.

On these grounds, the undersigned think they have a right to put it to the house, that the only fair deduction, from the votes of a majority of the committee, on the several points raised in the case of Mr. Nash, is, that he was duly chosen a member of this house, and is entitled to his seat. But the undersigned go further, and maintain that the votes for register of deeds should not be counted, and that upon the face of the record, as well as all the facts in the case, Mr. Nash was duly chosen a member of this house.

The question as first presented upon the record was solely whether two votes, given for ineligible persons, should be counted. But in the investigation before the committee, the petitioners alleged that four votes had been illegally received for Mr. Nash, and two votes for Mr. White rejected. On the part of Mr. Nash, it was contended that four legal votes had been rejected that were offered for him, and that one illegal vote had been received for Mr. White. The proof satisfied the committee, that all the votes for Mr. Nash were legal, and that two more votes for Mr. Nash than for Mr. White were rejected that ought to have been received.

The only fact in the case on which the committee differ is, whether Abner Field, who voted for White, was a resident in Whately.

The following is a copy of the entire record of the meeting for choice of representative and for register of deeds, on the

14th day of November in the town of Whately. The whole record should be taken together, that the intent of the voters may be fairly understood.

COPY OF RECORD.

'The following is a copy of the votes cast in the town of Whately, for representative to the general court, Nov. 14th, 1842.

For representatives to general court,—whole number of votes, two hundred and thirty seven.

For Thomas Nash, Jr., one hundred and eighteen.

" Justus White, one hundred and seventeen.

" Horace W. Taft, one.

" Charles Williams, one,—declared,—no choice.

Voted not to send a representative to the general court the present year.'

The following is a copy of the warrant and the doings of a meeting held in the town of Whately, Nov. 14, 1842, for the choice of a register of deeds for the county of Franklin.

'Franklin, ss. To Samuel B. White, constable of the town of Whately, greeting: In the name of the commonwealth of Massachusetts, you are required to notify and warn the inhabitants of the town of Whately, qualified to vote in elections, to meet at the meeting-house near the centre of said town, on Monday, the fourteenth day of November, inst., at one o'clock, P. M., to act on the following articles, viz :

Art. 1st. To choose a moderator.

Art. 2d. To bring in their votes for a register of deeds for the county of Franklin.

And you are directed to serve this warrant, by posting up attested copies thereof, at each of the public meeting-houses in said town, eight days at least before the time of holding said meeting.

Hereof fail not, and make due return of this warrant with your doings thereon to the town clerk, at the time and place of meeting aforesaid.

Given under our hands, this third day of November, in

the year of our Lord, one thousand eight hundred and forty-two.

PLYNA GRAVES,
SETH BARDWELL,
RODOLPHUS SANDERSON,
Selectmen of Whately.

Franklin, ss. Whately, Nov. 5th, 1842.

I have served this warrant by this day posting up attested copies of the same in each of the public meeting-houses in said town, eight days before the time for holding said meeting.

SAMUEL B. WHITE,
Constable of Whately.'

'At a legal meeting of the inhabitants of the town of Whately, qualified to vote in elections, held according to the foregoing warrant, Nov. 14, 1842, the following votes were given in, viz.:—

For register of deeds, Charles Williams had eighty-five.
" " " Horace W. Taft, " seventy-six.
" " " Waitstill Hastings " twenty-seven.
" " " Almond Brainard " three.

Voted to dissolve the meeting. A true copy of record,
Attest, SAMUEL LESURE, Town Clerk.'

The facts here disclosed are, that Horace W. Taft and Charles Williams were voted for, for register of deeds, at the same meeting at which a representative was voted for, and that, excluding the two votes for ineligible persons, given for register of deeds, and not for representative, Mr. Nash had a majority of the legal votes of all voting for representative.

The committee agree in all the points raised in Mr. Nash's case, except two, viz.:

1st. Whether the two register votes ought to be excluded, which would elect Mr. Nash.

2d. Whether Abner Feld was an illegal voter, and his vote should be excluded, which would also elect Mr. Nash.

On the first point, the undersigned rely on the practice, almost uniformly recognized by the house, of not counting votes

for persons ineligible to the office for which the votes appear to be cast.

This rule has been recently recognized and applied by the common council of the city of Boston, by a vote of thirty-one to eight, to the exclusion of three democratic members returned from ward one, in that city. In that case, three votes cast for persons not resident in ward number one, and therefore ineligible, were excluded from the count, although the ballots bore no designation but the names of the persons voted for. We refer to this case because it was decided, upon the opinion of a distinguished legal gentleman, Hon. John Pickering, the city solicitor; who was consulted by the common council, and founded his opinion entirely upon the course of proceedings and the precedents established by the legislature of Massachusetts. In that opinion he says:—

'The same word, the word *inhabitant*, being used by the constitution, in describing this qualification of the representatives of towns, and by the city charter, in describing the same qualification of the representatives of the wards of the city, the precedents (from elections in the house) are entitled to the highest consideration; and, in the absence of decisions to the contrary, in cases of municipal elections, they appear to be decisive authorities for the conclusion, that any votes given for a person as representative of a ward, when it is ascertained that he was not an inhabitant of said ward, would be deemed in law to have been erroneously given, and ought not to be counted by the common council, when that body should be called upon to exercise its right of judging upon the election of its members.' The Whately case is much stronger than this. The votes for Taft and Williams were not only given for persons not resident in the town, and therefore ineligible, but they bore on their face the intent of the voters, not to cast them against any candidate for representative. On both votes were the name of the town, and 'for register of deeds.'

The two pieces of paper read thus, 'Horace W. Taft, for register of deeds;' 'Charles Williams, of Deerfield, for register of deeds.' This is proved by the depositions of the three se-

lectmen, who testify to the word 'Deerfield,' on the Williams vote, and by the deposition of Josiah Allis, who testifies to the words, 'for register of deeds.'

Let us then apply the test of the intent of the voters, which ought to govern.

Did Mr. Nash receive a majority of the legal voters, voting for representative?

This is the test which the supreme judicial court have applied in the case of *Elisha Strong, Petitioner*, 17 Pick. 493. They there say:—'All the votes should be counted for the persons for whom they were intended, whether designated by residence or other addition, or not.' 'The only object should be to ascertain the expressed will of a majority of the electors. If the evidence is such as to produce reasonable conviction of the will of the electors, expressed by their ballots, it should be allowed to have its legitimate effect.'

This is all we ask in the case of Mr. Nash. Again, applying the test of common sense, is it possible to suppose that in the town of Whately, where all the voters must be known to each other, two voters would each deposit a vote for a non-resident known to all to be a non-resident, with the name of another town on the vote, and the words 'for register of deeds,' with the intent to have those votes count for a representative from the town of Whately, especially when a box was open at the same time, for votes for register of deeds?

In this view of the case, it is not necessary for the house to decide, whether votes for ineligible persons, aside from the intent of the voter, ought to be counted or not. They have only to decide whether votes plainly not given for a representative, but for another officer, ought to be counted, contrary to the obvious will of the electors, who cast them against neither candidate for representative, and with no intent to defeat the election.

The committee all agree, that the vote for Horace W. Taft should not be counted, because the voter who cast that ballot testified, that he intended it for register of deeds. The person who deposited the vote for Charles Williams, for register of

deeds, has not been produced, and is not known. Is not his intent as clearly shown by the designation on his ballot, as if he also had testified, that he did not intend that vote for a representative from the town of Whately?

The same reasoning that excludes the first, founded on the intent of the voter, must apply to the last, and therefore, both stand on the same ground, and both ought to be excluded, and Mr. Nash is entitled to his seat.

The second and only other ground of difference in the committee is as to the legality of the vote of Abner Field. Even granting what our colleagues on the committee assume, viz.: that the Charles Williams vote should be counted against Mr. Nash, still, if the vote of Mr. Field for White was an illegal vote, Mr. Nash is elected.

The deposition of Mr. Field is conclusive on the question of residence. He testified, that he had resided with his father in Hatfield for eight years, and held a farm there; that he came to Whately on the 29th of March, 1842, to work as a hired man, for seven months, for Charles Russell; that he intended to return to Hatfield at the expiration of the term for which he had let himself; that he used to return home to his father's on Sundays, as often as once in two weeks, as a general thing; that he considered it his home at Mr. Russell's during the first part of his stay there; if he had been sick, he should probably have been carried to his father's, and during this time he intended to return to Hatfield at the expiration of his time; in July, he had an opportunity of hiring a farm in Whately, and letting his farm in Hatfield, which was the cause of his changing his mind about returning to Hatfield; about the 25th of July, 1842, he determined to take the farm in Whately, and become a resident there; that before the 25th of July he continued to intend to return to Hatfield at the end of the seven months; that he hired the farm in Whately on the condition that if the owner sold it, he was to give it up, and he let his farm in Hatfield, on the condition that the occupant was to give it up, if he wished to return. The owner of the farm in Whately had given him

notice that the farm was sold, and the purchaser was about moving into the house. He expected to return to Hatfield when he left that farm. On the 13th of October, 1842, he was published in Hatfield to be married, and took his certificate from the town clerk of Hatfield, and was not published in Whately. He adds, that on the day of the election (November 14th) he had resided in Whately with the intention of remaining there, from the 25th of July last.

Applying to this state of facts the law of residence, as settled by the supreme judicial court, in the cases of *Thorndike* v. *Boston*, 1 Met. 242, and *Sears* v. *Boston*, ib. 256, and as construed uniformly by the house, in all cases of contested residence, the intent must fix the period of a change of residence. In Abner Field's case, he did not change his fixed residence in Hatfield, but was a legal voter there until the 25th of July, 1842, less than six months before the election. It may even be doubted whether he changed his residence then, as his residence in Whately depended upon the contingency of the farm he hired being sold.

His obtaining his own publication in Hatfield, on the 13th of October, which the law requires shall be taken out in the town where a man dwells, brings his intention down to a month within the time of casting his vote.

The consideration of this whole case is thus narrowed down to two single points, which are presented for the judgment of the house, namely:—

1. Ought the vote for Charles Williams, for register of deeds, to be counted against Mr. Nash, as a vote for representative?

2. Ought the vote of Abner Field to be counted as a legal vote?

If either of these questions is settled in the negative, Mr. Nash is entitled to his seat. We think that both should be so settled. We then, also, have two legal votes that would have been given for Mr. Nash, (namely, Brown and Willard Belden) wrongfully excluded by the selectmen, against which there is no offset; and, in the whole view of the matter, if the

design is to give effect to the declared will of the electors, 'under the guidance of good practical sense,' we see not how the house can refuse to recognize Mr. Nash as legally chosen a member by a majority of all the legal voters voting for representative, or claiming the right to vote.

We therefore recommend the adoption of the following order: Ordered, That Thomas Nash, Jr., is entitled to his seat in this house."

The report was first amended by substituting, for the conclusion thereof, the conclusion of the counter report, and then accepted; and it was accordingly—

Ordered, That Thomas Nash, Jr., is entitled to his seat in this house.[1]

ROWLEY.

The overturning of the ballot-box, and thereby breaking up a balloting which had commenced, under a belief on the part of the selectmen, that a person had voted twice, is an irregularity; but if done without any fraudulent purpose, and especially if it receives the tacit assent of the electors, and is further acquiesced in by a vote not to dissolve the meeting, it is not sufficient to invalidate an election subsequently effected.

Where a meeting for the choice of representatives, which was fully attended, refused at a late hour to dissolve, but proceeded to ballot again, and the selectmen, after the lapse of from twenty to thirty minutes, closed the poll, just before the sun was set, it was held, that the conduct of the selectmen, in thus closing the poll, furnished no evidence of an intention on their part to prevent electors from voting.

The election of Luther Moody, returned a member from this town, was controverted by Benjamin H. Smith, and sixty others, on the following grounds, stated by them in their petition:—

"The facts are these:—No choice of representative was made in said Rowley until the fourth Monday of November, and then in this wise. The meeting was opened at 9 A. M. One balloting was had before dinner, which resulted in no choice; the highest candidates having as many votes as the

[1] 66 J. H. 373, 374.

said Moody had when he was elected, and still wanting many votes of an election. The meeting was adjourned to the afternoon; and on the first balloting after dinner, when the votes were nearly or quite all in, and the poll had been opened from one to two hours, it was said by the selectmen that one man had put in two votes; whereupon, without closing the poll or counting the votes, the selectmen emptied the ballot-box upon the floor of the house, and proceeded to ballot again. If any choice had been effected at that ballot, Moody was not elected, as he was not a candidate at that time. Many of the voters had left the house, and did not cast their votes on the last ballot. And furthermore, the poll on the last balloting was kept open only fifteen or twenty minutes, to the extent, being closed by the chairman of the selectmen before sunset, and in the face of numerous objectors and voters, who were within the house, and hurrying to the box, and who would have turned the scale if they had been allowed to vote. In addition to this, it is believed that many names were not checked before the votes were deposited."

The committee on elections, to whom the case was referred, reported a statement of the evidence, from which it appeared, that the allegations in the petition were substantiated on the hearing. It also appeared, that after the ballot-box had been emptied by the selectmen, which was done without any fraudulent purpose on their part, the selectmen forthwith proceeded, without objection, to another balloting; that immediately previous to the last balloting, at which Moody was elected, the electors refused to dissolve the meeting; and that when the balloting had lasted from twenty to thirty minutes, the chairman of the selectmen gave notice, that if no person in the house wished to vote, he should close the poll; and, no one coming forward to vote, he closed the poll at once, just as the sun was nearly out of sight.

The committee concluded their report as follows:—

"The warrant for the meeting contained no notice how long the poll was to be kept open.

The record of the meeting shows, that on the first ballot

the whole number of votes was 156; Thomas E. Payson 67; Daniel N. Prime 66; scattering 23. On the second ballot, whole number 142; Thomas E. Payson 60; Daniel N. Prime 41; Luther Moody 28; and scattering 13. On the third ballot, whole number 138; Thomas E. Payson 52; Luther Moody 65; and scattering 13. On the fourth ballot, whole number 132; Luther Moody 69; Thomas E. Payson 42; and scattering 21.

The committee, in view of all the facts of the case, were of opinion, that the overturning of the ballot-box by the selectmen, under an impression and belief that a person had voted twice, was an irregularity; but that as it was done without a fraudulent intent, received the tacit assent of the town present, and was further acquiesced in by the town's subsequent vote, refusing to dissolve, and was followed by a ballot but little diminished in numbers, they did not think it should vitiate the election and deprive the town of its representation.

The committee were further of opinion, that the poll might possibly have been kept open longer, and possibly votes might have been received, which would have varied the result. Yet the town at a late hour had by vote refused to dissolve, showing thereby a strong desire to be represented. It was the duty of the selectmen, as far as possible, to prevent that wish from being thwarted by any breach of the (commonly called) sunset law. The committee were by no means led to believe, that there was any intention on the part of the selectmen to prevent citizens from voting; all those, who it is represented were late, and were excluded, had been at the meeting in the course of the day, and went away, relying upon their own calculations of a seasonable return, or perhaps with no intention of returning unless sent for.

In a ballot which had but six less votes than the immediately preceding trial, the committee think they can see no cause for a belief, that it was an illegal expression of the public voice, and therefore recommend that the petitioners have leave to withdraw."

This report was agreed to.[1]

[1] 65 J. H. 102, 126, 170, 171, 275.

BROOKFIELD.

In order to entitle a rejected vote to be counted, the voter must attend the meeting and tender his vote at the balloting, when the election takes place; and it is not sufficient that the voter's name is not on the list of voters, in consequence of which he does not attend the meeting, or that he tenders his vote and is refused at any other balloting.

THE election of Francis Howe, returned a member from this town, was controverted by Ebenezer Merriam and others, on several grounds stated in their petition, upon which the committee on elections made the following report:—

"The petitioners assumed the following grounds:—

'First. Because, at the meeting held for the choice of representatives in said Brookfield, in November last, the votes of one or more legal voters, duly qualified to act in said meeting, were rejected in the said choice.'

'Second. Because the votes of one or more persons, who were not legal voters, were received and counted in said choice.'

'Third. Because the names of one or more voters who applied, or caused application to be made, to have their names placed on the list of voters, were not placed thereon, and they were thereby excluded from voting, and prevented from offering their votes.'

'Fourth. Because the said Francis Howe, Esq., was not chosen as representative from said town in conformity with the provisions of the constitution and laws of the commonwealth.'

In support of these grounds, the petitioners produced, first, the record, by which it appeared, that the whole number of ballots was 538; necessary to a choice, 270; Francis Howe had 270; Mr. Walker had 264; Mr. Morse had 4.

The petitioners then produced evidence tending to show, that one William Bemis was not a legal voter, and had voted at that election for the sitting member.

The committee, however,—perceiving that if his vote should be rejected, the return would still stand, whole number, 537; necessary to a choice, 269; Francis Howe had 269; Mr.

Walker, 264; and Mr. Morse, 4; and that the return of Mr. Howe would still have been correct,—called upon the petitioners to produce further testimony under some one of their other propositions.

The petitioners thereupon undertook to show that Benjamin J. Lincoln, Jonas Bellows and Philo Ledoyt were all legal voters, and were not allowed to vote.

But it appeared that Jonas Bellows, being informed that his name was not on the voting list, did not go to the meeting at all, and that Benjamin J. Lincoln and Philo Ledoyt, though they attended the meeting and tendered their votes on the first or two first ballotings, yet that neither of them tendered a vote on the balloting which resulted in the election of Francis Howe.

The committee could, therefore, see no cause to complain of the rejection of votes which were not offered; and as the acceptance or rejection of the vote of William Bemis would not have affected the result, they recommend, that the petitioners have leave to withdraw."

The report was agreed to,[1] and it was accordingly ordered, that the petitioners have leave to withdraw.

BURLINGTON.

An election effected at a balloting which commenced after sunset is void.

The committee on elections, to whom was referred a petition of Joseph B. Blanchard and others, against the election of Abner Shedd, returned a member from this town, reported thereon as follows:—

"That the petitioners set forth, as the basis of their petition, that 'the poll was kept open an hour and a half after sunset.'

To support this allegation they introduced three depositions, from which the committee present the following extracts:—

[1] 66 J. H. 171, 228.

Edward Walker testified, that 'the town balloted three or four times. The last balloting, when Abner Shedd was declared to be chosen representative, was after sunset, and I should think it was as much as an hour. I think I was pretty nigh the last person who voted. I had determined not to vote, for it was so dark I could not see to read my vote. A man gave me one, and when I got to the lights I could see to read it. I think they balloted all of twice after sunset. I heard a man say they had better effect a choice before sundown, for he did not think they had a right to choose after sundown. It was Sylvanus Wood. I did not hear him or any other person object to the proceedings. For anything I saw, the meeting was carried on in a very peaceable and orderly manner.

'When I came out of the meeting it was clear at the west, and I could see stars. Daylight was not down then. I heard it observed in the meeting, but not by the selectmen, that they should keep the meeting open till midnight, unless they got a choice sooner. I think that at the last ballots, the selectmen had lamps enough to see well to do their business in sorting and counting the votes. There were three lamps on the selectmen's table. The last time there was one other in the gallery, and I saw no other one in the house. These lights did not light the whole house, but only about the table.'

William Nichols testified, that he was one of the selectmen, and presided. 'I cannot tell at what time the poll was closed, when Mr. Shedd was declared to be elected. I cannot tell whether the poll was closed before or after sunset. I did not think of the sunset law, and I did not take particular notice. We had occasion for lights in the meeting-house where the town-meeting was holden; and had them. I should think we had them for half an hour or more. Lights were brought in pretty soon after the first balloting. I cannot say how many ballotings were had after the lights were brought in, but I should say two or three. The ballots by which Mr. Shedd was chosen were deposited by candle-light. According to my recollection, it was a misty night, and when I came out of the meeting twilight had not then wholly disappeared. I do not know what time it was when I reached home.

'I perceived no dissatisfaction amongst any of the citizens at that meeting. I heard no objection of any kind urged by any one at that meeting. No motion was made to dissolve the meeting, or not to proceed any further. I think that the selectmen meant to conform to the provisions of the existing law respecting elections. The poll was kept open at the first ballot two hours. I noticed that by my watch. It was kept open on this ballot for that length of time, so that we might conform to the law, and for no other purpose. The ballots were all deposited for at least an hour before the poll was closed. I think the people then present at the meeting might deposit their votes in twenty or thirty minutes, and I don't know but it might be done sooner. The check list was used at every balloting, and the names of those who voted were checked. The poll was first opened at two o'clock in the afternoon.

'Mr. Shedd was chosen at the last balloting. I do not recollect that any person present at the meeting asked the selectmen or either of them, whether there was any time when it was important to close the poll. I heard some one say that there was a time when the poll must be closed. I heard no one ask the selectmen, whether the law prescribed a time for closing the poll, or anything of the kind. If I recollect right, Col. Winn, one of the selectmen, said we could vote till midnight. All that I heard said in relation to closing the poll, or any provision of law prescribing a time for closing the poll, was said by the selectmen.'

Silas Cutler testified that there were four ballotings, two before sundown and two after. A choice was effected on the fourth. * * * * * 'I cannot say when the poll was closed on the last balloting, but I should say between six and seven o'clock, P. M. I think it would take forty minutes for the persons present to deposit their votes, and for the selectmen to count and declare them, at each of the two last ballotings.

'The reasons I have for knowing that there were two ballotings after sundown were these. I recollect distinctly that the sun set clear that day. The morning of the day was rather cloudy, the sun came out at noon. There were some clouds in the afternoon; it was very cold that day; when we came out of the meeting in the evening it was clear, and a bright starlight.

'I say positively, on my oath, that the third balloting was commenced after sundown. I did not hear any objection made to the selectmen about the manner of proceeding, or about keeping the poll open as long as it was kept open. I heard no motion for a dissolution of the meeting, or not to proceed any further. I heard of no dissatisfaction at the time, but have heard of some since, from some of those present at the meeting, and from some who were not present. I have heard the chairman of our selectmen speak about the second meeting having been called, and say it was a doubt on his mind, whether it was lawful, and he disliked their calling another meeting. I do not mean to be understood that the chairman was dissatisfied at the meeting, or objected to the course of proceeding then had. He observed, that he was ignorant of the sunset law, and would rather have given twenty dollars than had it happened. There was dissatisfaction in town, and out of town people advised to have it looked after, as these cases would be looked after. I can't say whether there would or would not have been a petition had it not been for out of town people. I voted on the ballot when Abner Shedd was declared to be chosen representative.

'The question was asked of Col. Winn, whether it was right to keep the poll open after sunset, and he said they had a right to vote till midnight.

'It was my impression that the meeting understood from some source, that the selectmen had decided that they had a right to keep the meeting open till midnight. I heard it observed by several. My impression is, that something was said by Col. Winn, about the provisions of the sunset law not applying after the first balloting. There was some waiting after it began to grow dark, for lights, but I cannot say how long.'

The committee, in view of the above facts, arrived at the following conclusion: That the act of the town, in commencing a ballot after sunset, was a direct violation by the town of the law of the land. That, although a right to be represented is a high municipal privilege, and not to be taken away upon slight ground; still, a town violating the law has less claim to consideration. This principle was fully enforced in the year 1842, in the case of the town of Princeton, which town voted to dispense with the check list.

Wherefore the committee recommend the adoption of the following resolution:—

Resolved, That the seat of the member from Burlington be declared vacant."

A minority of the committee (Messrs. *Russell* and *Thomas*) dissented from the report in the following terms:—

"The only allegation set forth in the petition is, that the balloting at which the said Shedd was elected was had after sunset of the day of election, in violation of one of the provisions of the act of 1839, concerning eleetions:—

In support of this allegation, the petitioners offered to the committee the depositions of Edward Walker, William Nichols, and Silas Cutler, inhabitants and legal voters of Burlington. The respondent offered no evidence, but submitted his case on the depositions of the petitioners.

From these depositions, it appeared that the meeting, at which the sitting member was elected, was held on the 28th day of November; that the poll was opened at two o'clock in the afternoon, and was kept open two hours, during the last of which, no votes were deposited in the ballot-box; that on counting the votes it appeared that there was no choice; that afterwards several unsuccessful ballotings were had; that the last balloting, at which the sitting member was chosen, was commenced directly after sunset; and that at each of the several ballotings the check list was used; that no objections were made to the proceedings, no attempts made to dissolve the meeting, nor was there any evidence of a diminution of the number of ballots cast at the several ballotings; that in fact there was a perfect acquiescence in the result, till, as appears in one of the depositions, interference was had from abroad; and there is no charge of any fraud or unfairness on the part of the selectmen.

In view of these facts, the undersigned are constrained to dissent from the report of the majority of the committee; a report which recommends that the seat of the sitting member be declared vacated, not precisely because the poll was not closed before sunset, but because the balloting was commenced after sunset; a distinction, in the judgment of the undersigned, without any difference in law or equity.

The undersigned believe they might safely stop here, and be sustained in their judgment by the house, since the whole current of the reports on controverted elections favors the principle, that where the sense of the town is fairly expressed in the election, a failure to comply with the provisions of law is not sufficient to deprive a town of its representation; the design of these laws being solely to secure a fair expression. But there is another view which the undersigned desire to present to the house.

The right of representation in this house is a corporate right, of which the body corporate cannot be divested by any legislative enactment. It is also a corporate duty, for the non-performance of which the house may impose a fine; though it is optional with the body corporate to send, or incur the penalty. For the exercise of this right and the performance of this duty, the constitution allows to the towns a reasonable time. This time is fixed at four days. And by this, the undersigned understand four judicial days.

As the house cannot divest the towns of the right of choosing representatives, so neither can it shorten the period allowed by the constitution for its exercise. For if the legislature may say that the poll shall not be kept open after sunset, it may say it shall not be kept open after four o'clock in the afternoon, or any other hour in the day, and thus take away entirely the right of choosing, while one branch of the legislature, alone, may impose a penalty for not choosing. Without going at length into this subject, the committee submit to the house, that this is a case in which, to shorten the period allowed by the constitution for the exercise of a right, is to take that right away.

The undersigned, therefore, recommend that the petitioners against the right of Abner Shedd to a seat in this house have leave to withdraw their petition."

The house agreed to the report of the committee,[1] and thereupon,

[1] 65 J. H. 172, 183, 229, 258, 265, 275.

Resolved, That the seat of the member from Burlington be declared vacant.[1]

DARTMOUTH.

Three ballots having been found in the ballot-box, bearing the name of the same candidate, and so folded and doubled together, as to satisfy the selectmen that they were all put into the box by the same person, the selectmen thereupon rejected two of them and counted the third; and there being no evidence to contradict the conclusion of the selectmen, or to impute any unfairness to them, the house refused to set aside the election on the ground of such rejection.

The intention of a voter, testified to by himself, as to his residence, is to be taken as conclusive, unless impeached.

The election of Thomas K. Wilbur, returned a member from this town, was controverted by William B. Mason and others, on two grounds, first, because the whole number of votes given in at the election, when the member was supposed to be elected, was reported by the selectmen to be six hundred and fifty-eight, necessary to a choice three hundred and thirty; and that the member returned had the last mentioned number; whereas, in truth, the whole number of votes was six hundred and sixty-one; and the selectmen, in counting the votes, threw out and did not count three lawful votes, which were not given for the sitting member, but for another person; second, because the selectmen received a great number of illegal votes given for the sitting member, by persons, naming six, who were not qualified voters.

The committee on elections, to whom the petition was referred, made a report thereon, accompanied by a statement of the evidence, of which, it is only necessary to give extracts

[1] The question being about to be taken upon the Burlington election, before the call was commenced, Mr. Wales, of Boston, made a question whether the member from Burlington was entitled to vote on the adoption of the resolution. Mr. Speaker decided that he was not, and read from the rules and orders of the house, the 14th rule of the 2d chapter, and certain passages from the Manual, and Hatsell's Precedents, as the grounds of his opinion. Mr. Whitmarsh, of Seekonk appealed from the decision, and the question being stated,—shall the decision of the chair stand as the decision of the house,—the appeal was laid on the table, on motion of Mr. Allen, of Northfield. The question was then taken on the resolution, that the seat of the member returned from Burlington be declared vacant (the name of the member from B. being omitted in calling the house) and was decided in the negative.

from the testimony of three of the selectmen, relative to the first point, namely, the rejection of three votes.

William Barker, who was one of the selectmen, and present at the meeting, testified as follows:—

"In assorting the votes, perhaps we had assorted one-third of them, when I discovered three votes connected very closely together. I can show the committee the form of them. [Here the witness described to the committee the manner in which they were doubled.] They had the appearance of two votes when I first took them up. I took them up to look for the name on the vote. The first one was for Mr. Potter. I took that one off. I then looked at that remaining in my hands to see the name. Not seeing it very plain, I turned it over. I then suspected there were two votes. They stuck together, and I used considerable 'sucking' with my fingers, in order to get them apart. The corner of the whole was doubled over. They were all for William Potter. I showed them to the other selectmen. Mr. Packard took them, and laid them out on the board for future consideration.

We proceeded on, and directly I discovered two votes. They were twice doubled. [Here witness showed to the committee the mode in which they were doubled.] When the other ones were separated, one of the selectmen said: 'If you find any others, hold them up so that people can see them.' When I found them, I held them up, and said, 'What do you say to them?' Mr. Daniel Howland said, 'It is a rascally piece of work.' I then said, speaking to the other selectmen, what shall I do with them? Mr. Daniel Howland said, 'Do what you have a mind to with them.' They were then laid on the board with the other three. I examined to see for whom they were, and they were all for Mr. Potter.

We went on to finish sorting the votes. As we sorted them, Mr. Wilbur's were put into a ballot-box, and Mr. Potter's into a hat, and the three scattering votes into another hat. We then turned the Wilbur votes out of the box on to the board.

We took the three votes, when we had done sorting, and before we commenced counting, and put one of them into the hat—and the two votes, and put in one of them. Then we turned the votes out of the box on to the table, and proceeded to count. Mr. Daniel Howland interrupted us very much in counting. Mr. Wanton Howland said, 'You count and count loud, and I'll look over you.' I counted so, and when I counted 141 or 2, or something like that, Mr. Daniel Howland would say 43; and others seemed to interfere very much. When I had got through with counting Mr. Wilbur's votes, the number was given to Mr. Packard, the town clerk, and he took them down.

Upon cross-examination, the witness testified: I did not see any person deposit on the slide of the ballot-box more than one vote. I did not see any one put into the ballot-box anything which made it necessary that I should examine him on the spot, because I had the check list and Capt. Howland had the box. I saw something which called my attention to the fact, that it was attempted to put in more than one vote. I saw Mr. Howland when he spoke to Peleg Slocumb; he said to him, says he, 'You are too old a man to put in so many votes.' He had five or six in his hand. He went to the box, and Capt. Howland pressed his hand between the votes and the box, and prevented him from voting. I saw nothing else of the same kind. I don't know whether Mr. Slocumb voted afterwards or not.

I rejected the two votes because they were folded in such a way, that it appeared that they were put in by one man. I made my determination solely on their appearance.

I decided on the three votes on the same evidence; have no particular knowledge of the course pursued by Capt. Howland in pressing down the votes."

Wanton Howland, also one of the selectmen, testified as follows:—

"In sorting the votes, we found six written votes among the others, and I knew two of them to be Wilbur's votes, for I wrote them myself; the other four I concluded then were scattering votes. On examining them, however, I found one of them to be for Mr. Potter, and three for Mr. Anthony; and when we were assorting the votes, Mr Barker held up a parcel of votes—very square—and says to me, 'What shall be done with these votes?' He laid them down by themselves. He still continued to count, and soon took up another bunch of votes, and says, 'Here is another bunch of votes stuck together.' I observed to him it was best to put them with the others till we got through. We went on and finished sorting the votes.

The next thing was, what disposition shall be made of these two bunches of votes? My first impression was, that we should throw them all aside; but Mr. Packard said it was best to put in one from each, after satisfying ourselves that they were put in by one man, and to that all agreed.

I was satisfied then, and am now, that each parcel was put in by one man. Have not any doubt of it any more than if I had seen them. They were all for Potter; the two votes were faced together. There was only one vote in the whole that the name was visible on; that was the first one in the parcel of three, the two under ones in parcel three, and the two others were each faced together. They were so put together that they could not possibly have got together in the box. The names were facing inwards on the two under ones of the parcel three, and the corners of three were turned down. The two votes were doubled in the middle and no name to be seen when Mr. Barker passed them to me. Mr. Barker examined them before I took them. When we commenced counting the votes, we threw three of those votes away, and put two of them into the hat with Mr. Potter's votes."

Henry S. Packard, who was one of the selectmen, and also town clerk, of Dartmouth, testified as follows:—

"I heard some one,—indeed, several voices at the same time,—saying, 'That man has got more than one vote.' I looked up, and Peleg Slocumb was in the act of voting. I saw Capt. Howland making a motion with his hand, and the votes were flying out of Slocumb's hand. There was then a shout in the meeting.

Mr. Barker spoke, as they were sorting the votes, and said, 'Here are three votes that I believe come in together.' Capt. Howland said, 'Better lay them away till we get through sorting.' As he held them up, all three were a little parted, slipped by on one end. I said, 'Mr. Barker, if you find any more votes so, you ought to be particular to hold them up, and show them just as they are.' One corner was a little turned up as he laid them on the table; I could not see it in his hand. Mr. Barker then held up two more; they were doubled together, and appeared with a corner turned up straight, and as if they had been doubled down.

Upon cross examination the witness testified; I give my description of the votes as they appeared to me at the time. I observed that, 'We will take two and throw away three votes.' I did this on the ground that every person was entitled to one vote, and was satisfied from their appearance that they were put in by one man."

The committee concluded their report as follows:—

"It will be perceived, that the petitioners allege two reasons in support of their petition: first, that the selectmen threw out three votes which ought to have been counted against the sitting member; second, that persons not qualified voters were permitted to vote.

With respect to the first, the committee observe, that it will be perceived, by reference to the testimony of several of the witnesses, that, in assorting the votes, Mr. Barker, one of the selectmen, took from the pile of votes a parcel of three votes, folded together; that he called the attention of the other selectmen to it at the time, and that the parcel was laid aside for future consultation; that soon afterwards he found a parcel of two votes doubled together; that these also were shown to the selectmen, and to the bystanders, and were laid aside for the same purpose; that after the selectmen had finished sorting the votes, and before they proceeded to count them, these two parcels were examined; and they determined, unanimously, that three of the votes should be rejected, and two, one from each parcel, be counted; and three were rejected and two counted.

With reference to the conduct of the selectmen in this regard, the committee observe that there can be no question, that if there was full and satisfactory evidence that the three votes were cast by one man, two ought to have been rejected; and so if the two were cast by one man, one of them was properly rejected. The evidence to show these facts must of necessity often be, and in this case was, derived from the appearance of the ballots at the time. It is difficult to describe these appearances to the satisfaction of those not eye-witnesses. The committee believe that much, in these cases, is to be trusted to the judgment, integrity and good common sense of the selectmen. It is to be presumed that their judgment is correct, and the burden of proof is upon those who would question the correctness of that judgment. In this case there is not the slightest imputation upon their candor, fairness and deliberation. We feel safer in relying upon the judgment of such men in such a case, than upon our own impres-

sions; and although we adhere strictly to the general principle, that it requires the most conclusive and satisfactory proof of double voting, to justify the rejection of any vote; that a presumption of fraud is not sufficient, but that the selectmen must be satisfied, at the time, beyond all reasonable doubt, of the existence of fraud; yet, we believe, in a case where there is no fraud imputed to the selectmen, we may safely confide in their judgment, and leave the responsibility of deciding the question of double voting with them.

In respect to the second reason alleged by the petitioners, the committee are of opinion, that the burden of proof was upon the petitioners, to show that the persons whom they alleged had voted illegally were not legal voters; and that the testimony of the witnesses themselves, as to their intention of residence, unless impeached, is to be taken as conclusive. The committee have examined each case with care, and cannot find satisfactory evidence to invalidate the vote of any one.

Wherefore, the committee recommend that the petitioners have leave to withdraw their petition."

One member of the committee, (Mr. *Kellogg*,) dissenting from this conclusion, made a minority report as follows:—

"The petitioners allege that the selectmen declared the whole number of ballots to be 658; and that Wilbur had a majority of them, viz.: 330, whereas, in truth, the whole number was 661, and Wilbur's ballots were less than a majority.

The petitioners also allege, that six of Wilbur's ballots were cast by as many different individuals not qualified to vote; but, in the opinion of the undersigned, neither of the six votes is invalidated by the testimony.

The testimony of the selectmen supports the first allegation, and they admit that Mr. Wilbur was not elected, if three votes against him, which were thrown under the table, ought to have been counted. The selectmen were of opinion, from the appearance of these three votes, that they were surreptitiously cast.

The majority of the committee hold this opinion of the

selectmen (in the absence of any charge of fraud against them) conclusive; and that the house is thereby precluded from inquiring, whether the three rejected votes were spurious or genuine. From this opinion the undersigned, with great deference to his colleagues on the committee, is constrained to dissent. The house is declared, by the constitution, to be the judge of the 'elections' of its members. The first step, the house takes in the discharge of this duty, is to investigate the contents of the ballot-box, at the time the polls were closed. As in other cases of judicial investigation, the house must do it, not by personal inspection, but by the testimony of eye-witnesses. And the undersigned insists, that no barrier can be raised between the house and the ballot-box. The acts and judgments of the selectmen, affecting the election, are all subject to revision by the house. Their errors in rejecting votes cast, as well as their errors in refusing to receive votes, may be corrected. In either case, they must depend, not on the purity of their intentions, but on the judgment of the house, for their justification.

In the opinion of the undersigned, the rejection of the three votes from the count was wholly unjustifiable. True, the law makes the selectmen the guardians of the purity of the ballot-box. But it points out the mode in which they may exercise this guardianship, and, by inference, forbids them from adopting any other mode. They shall make the voters deposit their votes 'open and unfolded.' If they enforce this provision, the presumption is, that the purity of the ballot-box is secured. Capt. Wanton Howland, chairman of the selectmen, who held the box, testifies, that 'he knew what the law required of him, and that it was his purpose to execute [it] in regard to every voter, and that he called upon them often to bring in their ballots open. That he noticed the votes as they came in, with a view to see if any were doubled, but that he saw none.'

Henry S. Packard, another selectman, and town clerk of Dartmouth, testifies, that 'he was aware of the law in regard to bringing the ballots in open, and, so far as he was concerned, that law was enforced.'

The selectmen having done thus much, the undersigned thinks all the ballots in the box should be presumed genuine till proved spurious, 'innocent till proved guilty,' in accordance with a very precious maxim of law.

The undersigned submits to the house, that the evidence scarcely raises a suspicion against two of the rejected votes, and that, in regard to the other rejected vote, the evidence does not by any means reach the legal rule of excluding all reasonable doubt as to its spuriousness.

The undersigned thinks that it would be very dangerous, for the house to sanction the rule recommended by the majority of the committee, that the good intentions of the selectmen should shield their errors of judgment from correction by the house. He fears that such a ruling would enable selectmen, with very bad intentions, to disfranchise half of the citizens of the commonwealth with perfect impunity. The undersigned, therefore, recommends that the three rejected votes be counted, and the adoption of the following resolution: —

Resolved, That the seat of Thomas K. Wilbur be declared vacated."

The house agreed to the report of the committee,[1] and the petitioners accordingly had leave to withdraw.

EASTHAMPTON.

An election, which takes place at a meeting, the warrant for calling which does not specify the time of opening the poll, and at which the poll is not kept open two hours, as required by statute 1839, c. 42, § 2, is void.

The election of Eleazer W. Hannum, returned a member from this town, was controverted by Chauncy Parsons and others, on grounds which are stated in the following report thereon of the committee on elections: —

"In the examination of the facts in said case, the said Han-

[1] 65 J. H. 175, 221, 264.

num appeared before the committee, and, being sworn, testified as follows:—

'I am the chairman of the selectmen of the town of Easthampton. There was a meeting of said town on the twenty-eighth day of November last. On that day, the constable brought in his warrant, the town clerk being in the desk of the hall. The clerk then read the warrant, and the meeting was opened. This was near two o'clock, the meeting being warned to meet at that time. There was an article in the warrant, it was the first article, to see if the town would reconsider the vote passed at the former meeting, which was not to send a representative. It was then contended, that this meeting had no concern with the other, and it was moved to pass over this first article, and it was so passed over. The next article was to see if the town would choose a representative. It was stated, on the consideration of this article, that the meeting was unconstitutional. This discussion occupied considerable time. Several spoke and talked till some got uneasy, thinking their object was to spin out the time. All the time was occupied until a few minutes before three o'clock. It would not vary five minutes from three o'clock either way. It was then declared to be a vote to choose a representative. The poll was then opened by me, and I requested the voters to bring in their votes. They continued until all who had a desire to vote had voted. We closed the poll at sundown, being somewhere near half-past four o'clock. There was only one vote given during the last half hour. I asked, before closing the poll, if any one objected to it, which is our usual custom, and no one made any objection. The whole number of votes given in was ninety-nine, and of those I had sixty-four. At the election on the 14th preceding, there were one hundred and forty-seven votes cast in our town. We have, on our voting list, from 150 to 160 voters. The warrant did not state what time the poll would be opened or closed. I drew the warrant. At the spring meeting we usually have 100 votes cast. The warrant stated that the meeting would be held at two o'clock, but did not say what time the poll would be opened.'

It appearing, from this testimony, that the poll in this election was not kept open two hours, and also that the warrant calling the meeting did not specify at what time the poll would be opened, all of which is required by the second section of the forty-second chapter of the laws of this commonwealth, passed in the year one thousand eight hundred and thirty-nine, the committee are of opinion that said Hannum was not legally elected. They, therefore, recommend the adoption of the following resolution:—

Resolved, That the seat of Eleazer W. Hannum be declared vacated."

The report was agreed to by the house,[1] and the seat accordingly declared vacant.

The pay of Mr. Hannum was made up for his attendance during the session, including the day after the adoption of the report.[2]

LANESBOROUGH.

The following is the report of the second committee on elections in this case:—

"The committee on elections, to whom was referred the petition of Henry Shaw and others against the right of John Young to a seat in this house, as representative from the town of Lanesborough, have carefully considered the evidence on the part of said petitioners, which consists of depositions herewith submitted.

The said petitioners allege, that the said John Young was declared to have one hundred and eight votes out of two hundred and fourteen votes, being the whole number cast, and that one Isham Boon and one Varnum M. Babcock both voted for said John Young, and that neither had any legal right to vote in said election, and that these two votes being illegal,

[1] 65 J. H. 268, 275. [2] Same, 276.

and deducted from the number of votes given in and counted for John Young, will leave him with less than a majority.

To make out their points, the petitioners produced several depositions; but the committee could not find sufficient evidence to show that said Boon was not a legal voter, and, considering him to be a legal voter, the said John Young would be duly elected, even if the vote of Varnum M. Babcock was rejected. The committee did not, therefore, examine the evidence relative to said Babcock, or consider the question as to the legality of his vote.

The committee, therefore, recommend, that the petitioners have leave to withdraw their petition."

This report was received and read, and ordered to lie on the table.[1]

CHELSEA.

One, who is duly returned a member, has a right to take a seat and act as such, even though he is not duly elected, and ought not to have been returned.

If the choice of a representative is stated in the warrant for a town-meeting, the town may properly entertain any motion in relation to that subject; and a motion to reconsider the vote of a former meeting, to send a representative, is incidental thereto, and is in order, before the poll is opened.

An election, which takes place after a vote that the meeting be dissolved, and a declaration thereof made to the meeting by the presiding officer, is void.

In the course of the proceedings which occurred previous to the organization of the house, it was stated that Hosea Ilsley, returned a member from Chelsea, in virtue of a certificate of election, signed by the selectmen, and who had taken his seat, and participated in the proceedings as a member, was not legally elected, and ought not to have been returned; and a motion was made to amend the order,—relative to the right of the two claimants from Whately, and prohibiting them from exercising the functions of members, until their several claims had been investigated by a committee and decided upon by the house,—by the insertion therein of the name of the member returned from Chelsea,

[1] 65 J. H. 273.

with a preamble in these words[1],—"And whereas Hosea Ilsley, who has been qualified as a member from Chelsea, and who appears by the records of said town not to have been elected, has taken his seat as a member;"—but this motion was decided in the negative, 172 to 176.

The election of Mr. Ilsley was subsequently controverted by George C. Fairbanks and others,[2] on the ground, that the election took place after the meeting called for the choice of a representative had been dissolved.

It appeared by the petition and evidence in the case, that at the meeting of the town of Chelsea, on the 14th of November, 1842, it was voted to send a representative to the general court, but no choice was made, and the meeting was dissolved. A new meeting being called and held on the fourth Monday (the 28th day) of November, it appeared by the record of the meeting, that it was first voted to reconsider the vote, whereby the town voted to send a representative to the general court, and then that the meeting be dissolved.

The petition being referred to the committee on elections, the petitioners contended, at the hearing, that the town when assembled in town-meeting was present therein in their corporate capacity, whether the persons constituting the meeting were few or many, and was fully prepared to act upon all the matters specified in the warrant; that the meeting of the 28th was a separate and independent meeting, not at all bound by the vote at the meeting of the 14th to send a member, which was virtually reconsidered and reversed by the dissolution of that meeting without effecting an election; that the record being conclusive of itself on all matters previous to the dissolution, and the fact of a dissolution being granted, it would not be competent for the committee to go behind that recorded fact, and examine into the facts which took place after the dissolution.

The sitting member, admitting (for the purposes of the inquiry) the positions taken by the petitioners, contended, and introduced evidence to prove, that the alleged dissolution, being

[1] 65 J. H. 12. [2] Same, 23.

obtained by uproar, fraud, tumult and violence, was illegal; and that, in fact, the meeting was not legally and properly dissolved, until after he had been declared elected.

Much evidence was given on both sides, and stated at length by the committee, as a part of their report, relative to the point in question; but as the house appear to have decided, upon the evidence, that the dissolution of the meeting was not effected in the manner alleged by the sitting member; it will only be useful to present so much of the testimony, as may be necessary to explain the report of the committee, and the views of the minority as presented by them. For this purpose the evidence of two of the selectmen will suffice.

The testimony of Ebenezer Currier, who was chairman of the selectmen, and presided at the meeting of the 28th of November, was in part as follows:

"Prayers having been offered,—a motion was made to reconsider the vote of the former meeting, which was to send a representative. Several persons wished to speak on the question, and great disorder ensued; there was no constable present, and I at last put the question and decided that the vote was reconsidered. A motion was then made that the meeting be dissolved. The question was put, and one or more persons wished to speak. There was so much disorder and cries of question, that they could not be heard, and it was decided by me, that it was a vote to dissolve the meeting. One of the selectmen said, 'It was not right; that persons ought to have a right to speak,' and we concluded that a vote taken under such circumstances of disorder was illegal. We did not say so, however, to the meeting, except so far as that we declared, that a majority of the selectmen had determined to receive votes for a representative.

Immediately on my declaring the meeting dissolved, and while Mr. Cummings and myself were conversing together as above, the clerk had proceeded to present the box and call for votes for a moderator. No part of the warrant was again read, at that time; the whole warrant had been read at the beginning of the meeting. I think I heard the vote to dissolve the meeting doubted; the house was upon that divided, but not counted; for the appearance on inspecting the sides was as two to one. No measures were taken to see if those voting on either side were legal voters. It was again declared to be a vote.

It was about from fifteen to thirty minutes from the time that I last declared the meeting to be dissolved, to the time when I announced that a majority of the selectmen had concluded to receive the ballots for representative.

I cannot say if there was a division of the house on the question of reconsideration, there was such confusion that the gentlemen claiming a right to speak could not be heard,—I mean that it was so great that the inhabitants generally could not hear what was said. I suppose they heard the motions when they were put, though I cannot say they understood them. I put the question, 'Shall the meeting be dissolved?' people attempted to speak, and then there were cries of 'question.' These

would cease, but if any one attempted to speak, they were renewed. Thus it was still, when I said 'please to manifest,'—and when it was doubted, there were no cries or clamor, to my recollection. Mr. Cummings spoke to me, as I have stated, privately, at the time; there was no other public or private protestation against the vote.

I think it was after the clerk had declared that a moderator was chosen, that I announced our determination to receive votes. I can't say that any time was fixed for keeping the polls open to receive votes for moderator. The moderator had not come into the desk, and the selectmen had not left it. I had not left the desk from the beginning of the meeting until a representative was chosen. The town business was suspended, while we received votes for representative. I have no recollection of any attempt at that time, at a speech, or of any opposition to our proceeding; subsequently, a kind of protest signed by about sixty names, was placed on our table. I did not pay any attention to see if any persons left the house during the balloting for moderator. At the time the house was divided, the number of persons present was not less or more than one hundred and fifty.

The clerk proceeded to collect votes for moderator without consulting me; he did it, I presume, at his own instance. The vote for moderator was not large; the result of the ballot for representative, as announced, was, whole number two hundred and twenty-one. For Mr. Hosea Ilsley, one hundred and twenty-nine,—for Abner Gay, seventy-five, and seventeen scattering. I declared the result. I did not stop to see if the count was true. I can't say that the motion to reconsider was doubted,—there was a division on one vote, and my impression is that that was on the motion to dissolve. I cannot say about a committee's having been chosen to wait on the moderator and see if he would accept, or whether that was before the selectmen resumed action or not.

I did not object, and I know not of any one's objecting to the clerk's proceeding to receive ballotings for moderator;—I think I spoke something to the clerk about it, but don't remember what. My reasons for agreeing to receive ballots for representative were, that a number of persons came and presented votes, and claimed a right to deposit them, and also the votes had been taken amidst such noise and confusion, that I thought it not right. I recollect no threatening or intimidating language addressed to me, to induce us to receive votes. I thought Mr. Gould pretty anxious to vote.

I couldn't keep order; I could see no constable; the people would be quite still while I put the questions, but if any one attempted to speak, there would be cries of 'question.' I have no recollection that Mr. Bates, the constable, was present. I did not ask for one. I remember thinking about one. Mr. Beatty, the town clerk, was present, sitting by me, but I had forgot he was a constable. I did not desire to hurry proceedings. I did not, by word or act, attempt to preserve order; I can't say if there were any unsuccessful attempts to speak before the hand vote on the question of dissolution.

I think there were addresses made to me as chairman. I think Mr. Nowell addressed me before the hand vote on the dissolution. I don't know that Mr. Nowell was in the room before the balloting for moderator."

Daniel Cummings testified as follows:—

"I am, and was in November, a selectman of the town of Chelsea. We went into the desk about half past twelve, the warrant was read, and prayers were offered, and we were about getting the list of voters ready, when a motion was made to reconsider the vote of the former meeting. It was seconded, and put very quick and carried. Immediately a motion was made to dissolve the meeting,—the vote was taken and

declared. It was a hand vote. It was doubted. The house was divided, not counted. We were satisfied there was a majority for dissolving the meeting, by their appearance. All this took place very soon after the meeting was opened. No means were taken to ascertain if the persons voting were qualified voters, nor were there any exceptions taken to any one who voted. Two or three persons attempted to speak. I can't say that any person attempted to speak on the question of reconsideration. Two persons did on the last question, and perhaps more. There was so much noise round the room, and the question was put so quick that there was no chance; still I do not think the chairman announced or named any one as wanting to speak. I saw persons get up and take off their hats, and say, 'Mr. Chairman!' One man, (I think it was Mr. Nowell,) got on some steps, that were in the room, and said so, but the chairman did not respond to him. They (the meeting) would cry 'question! question!' and would not let him speak. I cannot say that the chairman attempted to bring the meeting to order, and give persons a chance to be heard. The question was put amidst the noise. They would stop and hear the chairman, but, if any body else attempted, they would raise the cry of question. In fifteen or twenty minutes after the declaration of the dissolution, the box was held for votes for representative. On this step the three selectmen did not have what might be called a consultation together. I spoke to the chairman about it, and I saw him turn and speak to the others. I expressed my opinion that it was wrong to dissolve the meeting, that the citizens had been called together to vote for a representative, and ought to go on; that there was nothing in the warrant about reconsidering, and that therefore the proceedings were illegal. My only reason was, that I thought it was not common sense to call the people together to choose a representative, and then dissolve without choosing one. I thought, too, that there was no opportunity for people to express their minds and opinions. I said so to the chairman. Previous to the last motion's being put, I said so to him, and he made me no reply.

I heard nothing said about a constable. One man came, and demanded as a right to put in a vote for representative. I cannot tell whether any citizens quit and went away after it was declared that the meeting was dissolved. Some were going out and in; there were other rooms in the building, and the matter of the town-hall was in the warrant yet to be acted upon.

The clerk figured up the countings, and returned or handed them to the chairman, and he stated the result to the meeting. Two hundred and twenty-one was the whole number of votes, I think. I counted and gave in seventy-three votes. No one counted after me; there are about five hundred and eighty voters on our list.

No votes had been thrown into the box for representative before the chairman declared that we were ready to receive them. Mr. Currier had, and used, the check list. I cannot say that I heard any one express a desire to speak before the putting of the hand vote to dissolve. There were cries of question, I am sure, before that vote was doubted. There was considerable noise in the room, stepping about, and people rushing up before the hand vote was put on the dissolution motion.

I do not recollect that the clerk read any part of the warrant after the motion to dissolve was put. He proceeded to receive the ballots for moderator, and I did not dissent, and I don't know that any body did. Mr. Abner Gay was declared elected moderator, and a committee was appointed to go for Mr. Gay. We had begun to receive ballots for representative before I knew that Mr. Gay had arrived. I am sure he had not attempted to act as moderator."

The conclusion of the report was as follows: —

"After the testimony was closed, the case was argued by Messrs. Brigham and Hallett, the petitioners contending that the subject of the choice of a representative to the general court being stated in the warrant, it was competent at any time before the poll was opened, and after the reading of the warrant, for any voter to move a reconsideration of the vote adopted at a former meeting for the choice of representative, or to move that the meeting be dissolved; the petitioners contended that this is the corporate right of the town, and that the decision of these questions in the affirmative must, of necessity, be conclusive upon the town; they also further contended, that the vote of dissolution having been declared to be carried, all proceedings afterwards were null and void, and that it was not in the power of the selectmen to resuscitate the meeting.

The counsel for the sitting member, on the other hand, contended, that it was not competent for the town to reconsider the vote passed at the former meeting, because the matter of reconsideration was not stated in the warrant, and he further contended, that the proceedings were illegal, because fraudulent, and did not allow a fair discussion and expression of opinion.

In reference to the first point, the committee are unanimously of opinion, that the matter of choice of representative being stated in the warrant is amply sufficient to entertain any motion in relation to that subject, and that the matter of reconsideration is an incidental question, which was perfectly in order, under the warrant, before the poll was opened.

The committee are also of opinion, that the right to reconsider is a corporate right of the town, and that, if that motion prevailed, or if the town had voted not to send a representative, the action of the town would have been legal; and a dissolution of the meeting, after such proceedings, would have effectually precluded a choice of representative on the 28th November.

But the case presented by the sitting member is one, which calls for the grave consideration of the committee and the house, and the correct decision of which, though not to be

arrived at without some difficulty, is of the utmost importance, and ought earnestly to be desired by members of all parties; as the decision of 'the Chelsea case' will doubtless be referred to in time to come, as a very important precedent in reference to other cases at all resembling this.

It is admitted by the sitting member, that a motion was made for reconsideration and for dissolution; and it is contended by the petitioners that these several motions were carried, and so declared by the chairman; but it is urged by the sitting member, that owing to the whole course of proceeding at the meeting on the 28th, by which said alleged dissolution was effected, the votes of reconsideration and dissolution are to be regarded as a nullity, and that the selectmen, in receiving votes for representative, and declaring the election, and certifying the result to the house of representatives, did no more than it was their duty to do under the laws of this commonwealth.

Two questions are thus presented for the consideration of the house:—

1. Can a state of things be supposed, which would justify the selectmen of a town in proceeding to receive votes for representative, after a vote of dissolution has been declared by the presiding officer to be carried?

2. If such a state of things can once be supposed, does the evidence in the present case exhibit such a disorderly and riotous proceeding, as justified the selectmen in receiving votes for representative subsequently to the alleged dissolution?

On the first point, a majority of the committee are of the opinion, that although the case must be a very strong one which would justify such a course on the part of the selectmen, yet that such a case is supposable.

A free and full expression of the popular will, upon matters submitted for the action of the voters, is essential to the continuance of free government, and this will is expressed both by speaking and voting; thus it is conceded, that a fair vote, by an undoubted majority on a show of hands, or by a poll of the house, should be conclusive upon the selectmen and the voters themselves.

But the right to speak, by way of expressing our own opinions, and with a view to influence others, by arguments addressed to their consideration, is as important as the right to vote; and a result, obtained by preventing such an expression of the will of the legal voters present at a meeting, is virtually a fraud upon them, whether so intended or not, and ought to be treated as a nullity.

If a motion should be regularly made to dissolve a meeting, and the chairman should, without good cause, refuse to entertain the motion, or to submit it to the meeting, it would undoubtedly afford good ground for a petition against the seat of a member, who should be elected at such meeting subsequent to such refusal.

If, then, there is a determination manifested by four-fifths of a meeting that the remaining one-fifth shall not be heard upon a question, and the chairman, whether by fraudulent connivance or through timidity or imbecility, allows himself to be used by this majority to overwhelm, stifle and effectually prevent the utterance of a single word of debate on the question, or of remonstrance against the proceedings, or of argument and reasons in favor of an opposite course of proceeding, shall a vote, obtained under such circumstances and in connection with such suppression of debate, be regarded as valid? especially if, upon reflection, the presiding officer himself, who has been used to secure such a vote, virtually declares it to be a nullity and acts accordingly?

The committee cannot believe that the house will assent to the exercise of such power, or say, by their action, that a dissolution obtained under such circumstances is anything more than a nullity.

To hold an opposite opinion is to maintain that it is competent for selectmen, or even for one selectman without the advice or consent of his colleagues, to dissolve any meeting called for the election of representatives, even though every man in the hall, with the exception of the chairman and the man who makes the motion, is acting under misapprehension; and thus a town may lose its representation for a year, past remedy.

simply by the perfidy or the ignorant action of the chairman of the selectmen.

As to the second point of inquiry, viz.: were the proceedings at Chelsea, on the 28th of November, such as justified the selectmen in receiving votes for representative, notwithstanding the alleged vote of dissolution; a majority of the committee entertain the opinion that they were.

The evidence, upon which this opinion is founded, is fully reported to the house, and it is unnecessary to recite it in this connection.

It appears, that it was the intention of a number of the democratic party, to prevent if possible any attempt to elect a representative on the 28th, because they were not satisfied with the caucus candidate. Great efforts were made to procure a full attendance, at the time specified in the warrant for the opening of the meeting, as appears by the arrival of the omnibus loads of voters at an early hour; and the clerk was severely censured for dilatoriness, on his arrival at the hall, and the meeting was opened at a period unusually early, as appears from what is proved to have been the custom of the town.

These circumstances, however, though taken in connection with subsequent events, they show that the manner in which the alleged dissolution was effected was a matter of concert and predetermination, yet in themselves considered, would not form any adequate ground of objection to the supposed dissolution. Indeed, far be it from the majority of the committee to deny the utmost latitude of the right of meeting at the democratic or any other head quarters, and discussing either the claims of candidates, or the expediency of foregoing the right and privilege of town representation.

But when these previous discussions give rise to a course of proceeding, such as took place at Chelsea, at which a warrant was read—a prayer made—a reconsideration moved and carried—the house divided—a motion for a dissolution made, and asserted to be carried, and the house divided; and all this effected in from fifteen to twenty minutes of time—and no per-

son allowed to speak, though many attempted to do so, but were prevented by the meeting, by means of the cries of 'question,' which ceased only when the chairman stated the question, and commenced again whenever 'Mr. Chairman' was heard; and when no attempt was made by the chairman to produce order, or to secure an opportunity for a word of debate, by a single person who desired it; and, (to pass over intervening events,) when we find a proposition deliberately made in a meeting, organized by a chairman and secretary, (at which a protest was drawn up and signed during the balloting for representative,) to throw a handful of votes into the ballot-box; then do we regard these previous movements as part of an extended plan, which was to be accomplished by the use of means that are highly censurable, and which, if countenanced and imitated, must eventuate in the overthrow of free government.

Seeing the course of the meeting, some of the voters of both political parties were earnest in asserting their rights as freemen, and well they might be, as long as they expressed their sentiments, and did not attempt to remedy evil, by the violation of law.

The selectmen, on consultation, and before the person who was said to be chosen moderator came into the box or attempted to act, became satisfied that they ought to proceed under the warrant, and receive votes for representative; they did so, and the record of this part of the meeting, though made at the same time and on the same memorandum book, with the other proceedings, was not copied by the clerk into the volume of town records, but was distinguished by the word 'remarks' being placed over it, some days after the meeting. This record shows that Mr. Ilsley was elected by a clear majority; 116 being the number necessary for a choice; and although his vote is stated at 129, it appears by the testimony of two unimpeached witnesses, that there was evidently a mistake in the declaration of the count, and that he probably received many more votes, perhaps in all 231. The clerk himself admits, that he might have made a mistake in giving his

count, which indeed is the only way of reconciling the error, as there is nothing in the evidence, or in the appearance of the clerk, to lead the committee to suspect for a moment, that the mistake, if committed, was intentional.

Under these circumstances, and in view of the evidence herewith submitted, the committee recommend that the petitioners have leave to withdraw."

A minority of the committee, (Messrs. *Thomas*, *Russell*, and *Williams*,) dissenting from the opinion of the majority, as expressed in the foregoing report, presented their views to the house in a minority report, as follows:—

"The sitting member claims to have been elected at a meeting of the citizens of Chelsea, held on the 28th of November. The town record, which was produced and sworn to, by the town clerk, shews no such election, but, on the contrary, that prayers having been offered, and the warrant read, a vote was passed to reconsider the vote of a former meeting, by which the town voted to send a representative, and then it was voted to dissolve the meeting.

The sitting member, with the leave of the committee, assumed to prove that the record was fraudulent, in respect to the votes to reconsider and dissolve. Of the success of this endeavor, the house will judge by the evidence. Every witness on both sides, who testified to that point at all, testified, that after prayer and the reading of the warrant, a motion was made and seconded to reconsider the vote passed at a former meeting, by which the town voted to send a representative; that this motion was distinctly put to the meeting by the presiding selectman, and by him declared to be a vote, two-thirds present, at least, voting in the affirmative; that a motion was then made to dissolve the meeting, which was also put to the meeting by the same officer, and by him declared to be a vote, two-thirds, at least, voting in favor of it. The testimony further shows, that both of these votes were made certain by a division of the house, and that they were fully understood by the meeting.

The business of the town clerk, in the judgment of the un-

dersigned, is to record what is done in town-meeting; and as in this case, there is the fullest proof that these votes were actually put, carried and declared, we are unable to perceive how it can be charged, with any show of propriety, that the record is fraudulent. The record simply asserts a fact; that fact is borne out by the evidence. Where, then, is the fraud? The question of the competency of the town to pass upon motions is one thing, the question whether or not the town passes upon motions is another thing; and the latter is the only thing with which the record has any concern. The quarrel of the sitting member, then, is not with the record. The record cannot be fraudulent, because what it alleges was done, was done.

It is admitted by the majority that the town was legally assembled; that the matter of choosing a representative was sufficiently stated in the warrant to authorize the town to entertain any motion in relation to that subject; that the motion to reconsider the vote of a former meeting by which the town voted to send a representative, was within the competency of the town to pass upon; that such a motion was made, and made at the proper time; and that, 'if that motion had prevailed, or if the town had voted not to send a representative, without reconsidering the former vote, the action of the town would have been legal, and a dissolution of the meeting, after such proceedings, would have effectually precluded a choice of representative.' The only point in dispute, therefore, between the majority and the undersigned is, whether, in the language of the majority, the motions to reconsider and dissolve 'prevailed.' And on that point the undersigned believe that the house will not want evidence to determine.

In the view of the undersigned, here is the end of the case. The town voted to dissolve the meeting; it had a right so to do; and whether for a good reason or a bad one, whether hastily or deliberately, so that the vote was made certain, there was the end of it. No subsequent act could give it vitality. Up to that time no representative had been chosen.

But here the majority interpose a new theory, certainly new

to the undersigned. They gravely tell the house, that these votes are to be regarded as a nullity, and what took place afterwards was perfectly legal and proper. And the reason they allege for this conclusion is, that 'the whole course of proceedings on the 28th' was exceptionable. The minority think with the majority, if indeed there be any virtue at all in precedents, that the correct determination of this question is 'very important,' as forming a 'precedent for the decision of cases in future,' and for this reason the minority regret that the majority had not been a little more explicit in their statement; 'the whole course of proceedings,' being a very indefinite expression.

On looking, however, to the statement of the argument of the counsel for the sitting member, as set out in the report of the majority, the undersigned find that the reason urged for this conclusion is, 'that the votes were obtained by uproar, fraud, tumult, and violence.' As the undersigned are not able to appreciate the difference between 'uproar' and 'tumult,' they may, perhaps, be pardoned, if in considering this branch of the subject, they reduce these four specifications to three. The undersigned, would, however, first premise a word as to this new view of the majority. The dispute between us is still one of fact, namely, whether the votes above referred to 'prevailed.' And we had supposed that a vote of dissolution was none the less a fact for being obtained by fraud, tumult, or violence. If these votes had 'prevailed,' say the majority, they would have effectually precluded the choice of a representative, but then they were obtained by uproar, fraud, tumult and violence. The undersigned are unable to understand how a vote can have 'obtained' and not have 'prevailed,' for we had supposed that both words denoted the same fact, and the fact being admitted, we repeat, there was an end to the meeting.

If the distinction claimed by the majority be real, it can only be the pulling down one's house with, or without the leave of the law. In either case the building is destroyed, though most of the materials remain.

Besides, suppose a vote taken amidst confusion is to be re-

garded as a nullity. Is not every vote taken under the same circumstances to be regarded as a nullity also? And if so, what becomes of the claim of the sitting member? If it be unlawful to reconsider a vote by fraud, tumult and violence, can it be lawful to elect a member of this house by the same means?

But how stands the fact about the fraud, tumult and violence? The house will bear in mind, that in this case, the burden of proof is on the sitting member. He claims to prove the record a fraud, and impeach the oath of the town clerk. He must then make out his case.

1. As to the *fraud*, where is the proof of it? Does it consist in what was done before the meeting or at the meeting? If before the meeting, in what act? Was it a fraud in Haskell to get people to go to the meeting early? Was it a fraud in the people to agree to go to the meeting with a determination to vote not to send a representative? though the evidence negatives the idea that they went there with that determination. The majority, it appears to the undersigned, conclude themselves against this argument, by admitting that the town was legally assembled and competent to act upon the motion, when it was put.

If it consists in what took place at the meeting, in what act? Was it a fraud in Haskell to make the motions to reconsider and dissolve? or in others to second the motions? or in the chairman to put them to the meeting? or in the people to vote for them? Was it a fraud in Gleason to attempt to speak to the question? or in others to call to order, when, in their judgment, he was speaking out of order? or in the chairman, that he did not wait longer to hear him? If in the chairman, then, the undersigned submit, his testimony ought to have been voted out of the case, for he was the witness of the sitting member, and by a rule of law known to none better than to the majority, ought not to be held to criminate himself.

In respect to the alleged denial of the right to speak, the undersigned observe, that the testimony of Mr. Blaney is clear to that point: 'Mr. Gleason attempted to speak before the

chairman stated the question, on the motion to reconsider. He had not then stated the question. The chairman said, "I'll state the motion, gentlemen, and you can speak afterwards." I did not hear any one speak afterwards, before the vote was taken. The chairman said it would be open for debate after he had stated the question, or something to that effect.' The testimony of Mr. Gleason himself is, that he merely said 'Mr. Chairman.' And he and Mr. Haskell agree in the fact, that immediately after he made this call upon the chairman, Haskell went to him and, requesting him not to speak, called off his attention. The only person, whom the selectmen can identify as having addressed them on either question, was Mr. Nowell; and the proof is conclusive, that Mr. Nowell was not in the hall till the meeting had been declared to be dissolved. This appears from the testimony of Nowell himself, as well as from others.

Mr. Currier, the chairman, swears that he cannot say there were any attempts to speak on the hand vote for dissolution. And Mr. Cummings, the other selectman, has no recollection that any person attempted to speak on the question of reconsideration. Mr. Nowell is the only one he can recollect who addressed the chair.

Mr. Darius A. Martin, much the swiftest witness introduced by the sitting member, testifies that there were three or four persons attempted to address the chair, and soon after he magnifies them into a dozen; but he states expressly, that he can identify no one except Gleason, who attempted to speak before the hand vote.

The undersigned are sure that the house has but one rule for the settlement of the same question. And the house has decided, in the case of Rowley, at this session, that a knowledge of the wish of the person, desirous to be heard in town-meeting, must be brought home to the selectmen, to be material. Here it is only brought home in the case of Mr. Nowell, and that after the hand vote to dissolve the meeting. Will the house adjudge the town of Chelsea to have committed fraud upon such evidence?

2. As to the *tumult.* The evidence is in some respects contradictory; but the weight of it proves that the tumult was after the meeting had been dissolved, and when the votes were being received for the sitting member. Mr. Slack describes the meeting at that point of time like the 'meeting of Ephesus;' but he also states that before the votes were put and declared, there was no more confusion than he has seen on former occasions at meetings in Chelsea. Mr. George C. Stearns, one of the most intelligent witnesses examined, testifies that there was sufficient stillness in the hall when the motions were put for any one to speak who desired to. Mr. Benjamin T. Martin swears that the meeting was as quiet as he ever saw a meeting in Chelsea, on the question to reconsider; and even the testimony of Mr. Darius A. Martin, the witness above referred to, leaves no doubt that the meeting fully understood the questions. He says: 'The chairman, I think, stated the question to the meeting. He then gave them to understand what the vote was.' The undersigned are clearly of opinion, that the weight of evidence shows, that the confusion arose from the fact, that the whig party were dissatisfied with the votes to reconsider and dissolve, and it consisted in their expression of that dissatisfaction after the votes had passed; and subsequently in the dissatisfaction of the democrats that the polls were opened for representative after the meeting was ended.

In closing their remarks on this point, the undersigned invite the special attention of the house to the evidence touching the fact that no one urged, as a reason for the illegality of the votes to reconsider and dissolve, at the time, that persons had not been permitted to speak to those questions. In our opinion, it is proved beyond all controversy, that this is entirely an after-thought. Up to the time of the meeting of the legislature, it was placed solely on the ground, that the votes were not within the competency of the town to pass upon, inasmuch as no article to reconsider was put into the warrant. The sitting member placed the issue there; one witness says he has battled it day in and day out on that ground, and never

heard of any other. The famous speech of Mr. Gould, made after the dissolution, related solely to the fact, that no article was in the warrant; and the legal opinion of Mr. Hallett, written on the evening of the election, which was designed to cover the case, and, undoubtedly, to influence the action of the selectmen in regard to the certificate, has not a word on the subject of uproar, fraud, or violence.

Before adopting a rule fraught with such evil consequences, the undersigned pray the house to pause. A town may meet and vote to send a representative. The people go into the election, and a member is returned to this house, having a large majority of the votes. A citizen of the town may come before the committee on elections with a lie in his mouth, and, like Darius A. Martin, whom nobody ever heard address the chair, and who could not recollect himself that he ever did till the day after his first examination, swear that he attempted to speak on the vote to send a representative, and that he was not permitted to be heard; and on that evidence the election is vacated. What becomes of the corporate rights of the towns in this Commonwealth under such circumstances?

Nor is this all. The vote of a town appropriating money, should the court adopt the rule, may be set aside for the same reason, and taxes never could be collected. In short, no town business could ever be legally transacted.

3. *Violence.* The undersigned have carefully attended to the evidence, written it out at length, re-written the greater part of it, and read the whole over and over again, but have nowhere found anything like violence to person or rights, if anything further is intended than we have noticed under the preceding allegations. And were it not for the high estimation in which we hold the character of the counsel for the petitioners who made the allegation, and for our regard for our colleagues of the committee who have endorsed it, we should feel constrained to conclude, that it was intended rather to give rotundity to a period, than as a serious charge to be proved.

The true state of this case the undersigned believe to be

this: the democrats had two candidates on the 14th of November—Mr. Bent and Mr. Brownson,—and failed of an election. On Friday evening preceding the 28th, the party met, and, dropping both of these candidates, agreed upon a third, Mr. Gay. On the following morning, one of the supporters of Mr. Bent, who was unfriendly to the election of Mr. Gay, expressed dissatisfaction that Mr. Bent had been dropped, and endeavored to enlist others with him to oppose the election of Gay; three or four others joined with him in a determination to dissolve the meeting, but, on the same day, abandoned the determination, and prepared votes for Mr. Bent. The mass of the party prepared tickets for their candidate, and made other preparations for the election. The unusual interest which was everywhere felt in the elections of that day, and in which they participated, brought them early to the polls. Finding the friends of Mr. Bent unwilling to drop him and go for Mr. Gay, and despairing of any choice without such union, they determined, on the spot, with a solitary exception, to dissolve the meeting without going into an election; and to insure legality in their proceeding, first reconsidered the vote of a former meeting. One of the selectmen, originally opposed to the vote to dissolve, readily consented to open the polls for representative; the other, intimidated by demands from persons to vote at his 'peril,' and by other menaces, yielded acquiesence. The third selectman, though introduced by the sitting member and sworn, was never called to the stand.

In conclusion, the undersigned submit:—

1. A town has the corporate right to vote not to send a representative, and may lawfully exercise that right under an article in the warrant 'to choose a representative.'

2. The proper time for exercising such right is after reading the warrant and before proceeding to ballot.

3. When a meeting has been declared to be dissolved by the chairman, and that decision affirmed by a majority of the voters present, all proceedings are concluded.

In view of which the undersigned recommend the adoption of the following order:—

Ordered, That the seat of Hosea Ilsley, the sitting member from Chelsea, be declared vacated."

The report of the committee was first amended, by substituting for the conclusion thereof the conclusion of the minority, and then as amended, the same was agreed to, and it was, accordingly—Ordered, That the seat of Hosea Ilsley, the sitting member from Chelsea, be declared vacated.[1]

FAIRHAVEN.

A meeting being called and held for the election of state officers, to be voted for on one ballot, and of a representative in congress, to be voted for on another ballot, and in separate boxes appropriately labelled, the selectmen gave notice, that votes found in the wrong box would not be counted; it was held, that a vote for representative in congress, found in the box appropriated to the votes for state officers, was rightly rejected.

The election of Jones Robinson, returned a member from this town, being controverted by a petition of Caleb Church and others, which was referred to the committee on elections, the committee made the following report thereon:—

"The only allegation set forth in the memorial of the petitioners is the following: 'That at the late election for state officers, held in the town of Fairhaven, on the fourteenth day of November last, the whole number of ballots given in to the selectmen, for representatives to the general court, was six hundred and forty-six, and that a majority of the board of selectmen, in counting the same, did arbitrarily and unjustly, and contrary to the remonstrances of the minority of said board, throw out and reject one of the said ballots, bearing the names of two candidates supported in said election, in opposition to the members at present sitting in the house, as representatives of the said town, by which illegal procedure the number of votes necessary to a choice, was reduced to three hundred and twenty-three, and Jones Robinson having that number, was thereupon declared elected.'

[1] 65 J. H. 293, 368, 371, 376.

In support of the foregoing allegation, the petitioners called several witnesses, viz.:—

Caleb Church, who testified as follows:—'I am a legal voter in the town of Fairhaven, my name is on the check list in said town. At the town-meeting in November last, two boxes were used by the selectmen for the reception of ballots, one for state officers and the other for United States officers; both of said boxes were labelled, but I did not know it at the time I put in my votes. I put my vote for member of congress into the box for state officers, and my vote for state officers, into the box for United States officers.

Mr. Whitwell, one of the selectmen, told me of my mistake, soon after I dropped my votes into the boxes. I think no one had voted after me, before I discovered my mistake; it was very soon after; two minutes had not elapsed before I discovered my mistake. I immediately asked permission to rectify my mistake, but the selectmen would not allow it. I asked Mr. Whitwell, and he refused my request. Mr. Whitwell held the box for state officers, and Mr. Clark the box for United States officers. I think I put my votes into both of the boxes at the same time; they being near together, so near that I could conveniently reach them both at the same time. I did not look into the box to make myself certain of my mistake; I had no other means to ascertain my mistake except what Mr. Whitwell told me. I had deposited my votes in both boxes, before I was informed of my mistake. I voted the whig ticket for state officers, and I intended to vote for the two whig candidates for representatives to the general court. I have been in the habit of attending town-meetings when I have been at home. Have followed the seas sometimes.'

F. R. Whitwell:—'I am one of the selectmen of Fairhaven. At the town-meeting in November last, two boxes were used by the selectmen, in which to receive votes, both labelled, one for state officers, and the other for United States officers. I held on that day the box for state officers, and Mr. Clark the box for United States officers. It was named distinctly in the warrant for calling the town-meeting, that the candidates for state officers would be voted for on one ballot, and for representative to congress on a separate ballot, and it was declared in the meeting again and again, by the selectmen, how the votes were to be received, and the voters were cautioned against depositing their ballots in the wrong box, for if they should happen to be so deposited, they would not be counted, for it had so been determined by the selectmen. The boxes were held by Mr. Clark and myself, about two feet apart.

A short time after the balloting had commenced, a mistake was made by a voter in casting both votes into the same box. The voter came forward and requested to vote again, he having deposited both of his votes in the box for state officers. The selectmen decided that he could not vote again, nor could he take out the vote he had deposited. He said he understood his vote would not be counted, and therefore he demanded the privilege of taking out his vote or to vote again; but he was not permitted to do either. Subsequently Mr. Church cast a vote into the box held by Mr. Clark, which was the box for the votes for representative to congress; I noticed it from the size of the vote; it was for state officers—the ballots for state officers being about four times as large as the votes for representative to congress. I called the attention of Mr. Church to the circumstance. I did not read the vote. When the poll was closed we commenced counting the votes for state officers, and the result of the vote for state officers was declared, before the sorting or counting of the votes for

representative to congress. In sorting the votes for representative to congress, there was one ballot found among them bearing the names of the several officers for state officers. I do not swear that Mr. Church put in such a vote. I do not recollect that Mr. Church asked me to permit him to take out his vote. My impression is, that Mr. Church put both his votes into the same box—the one held by Mr. Clark. The tickets of both political parties were of about the same size.'

Mr. Whitwell subsequently amended his testimony by adding the following: 'I, F. R. Whitwell, do further say, that a man, I think by the name of Lewis L. Bartlett, a schoolmaster in Fairhaven, early in the meeting on the 14th November, came up to the ballot-box held by me on that day, which was the box for state officers, and dropped into said box two votes, one large vote and one small one; he immediately discovered his mistake, and requested permission to take out his vote for representative to congress, stating that he had learned that the vote he had cast would not be counted; the selectmen told him he could not do it, and he did not do it.'

Cyrus E. Clark, called by the petitioners:—'I am one of the selectmen of the town of Fairhaven. The town-meeting on the 14th November last was opened by reading the warrant; and before any votes were received, the selectmen stated to the meeting, that two boxes would be used for the reception of votes; the boxes were labelled in large letters, one for governor, lieutenant-governor, and for state officers, and the other, representative to congress and electors. The box for state officers was on the left hand of the desk, and the box for United States officers on the right hand of the desk. And it was declared by the selectmen, that all votes put into the wrong box would be rejected; and it was again repeated that the box for state officers was on the west end of the desk, and the box for United States officers was on the east end of the desk, and that all votes put into the wrong box would be rejected, and no person made any objection to the rule which the selectmen had so established and proclaimed to the meeting.

After the meeting had determined the number of representatives to be sent to the general court, the selectmen called upon the voters to bring in their ballots, stating, at the same time, that every voter must wait till his name could be found on the list and checked.

There was one person who, Mr. Whitwell said, had voted wrong; he mentioned the fact to the man; he made no request in my hearing to have his vote changed.

After the poll was closed, we put the cover on the box for representative to congress, and took the box for state officers, sorted, counted and declared them, before we touched the other votes. We then sorted the votes for representative to congress; we found one vote for state officers in the box for representative to congress; that vote for state officers was not counted, but thrown out.'

Elbridge G. Morton, called by the petitioners:—'I am one of the selectmen of Fairhaven, and my story would be only a repetition of what the other selectmen have stated.

I, however, think proper to describe the boxes used for the reception of ballots. The boxes were painted with a white ground and lettered with black letters, seven-eighths of an inch square, and were lettered as has been before stated.

The warrant was read, and the selectmen made the proclamation that has before been stated, that ballots found in the wrong box would not be counted, but would be thrown out.

Mr. Whitwell stood at my right, holding the box for state officers, and Mr. Clark for representative to congress; my part of the duty was to ascertain the names of the

citizens as they approached to put in their votes, and to announce their names to those who had charge of the check list; the names would be responded to by the persons holding the check list, before they were permitted to put in their votes.

The proclamation was frequently repeated by the selectmen during the day, that votes would not be counted if the voters should make a mistake by putting their votes into the wrong box. I am not able to say that I saw any voter deposit his vote in the wrong box; I do not recollect that Mr. Church claimed the privilege of changing his vote, and cannot swear that he did not.

I can swear, that in counting the votes for state officers, we found one vote for Barker Burnell for representative to congress.

At the opening of the meeting, no one expressed any dissatisfaction with the arrangement of the selectmen; which was, that no votes would be counted that were deposited in the wrong box.

After the votes for state officers had been counted and declared to the meeting, we proceeded to count the votes for representative to congress, and one vote for state officers was found among them, which was thrown out. I do not recollect that any objections were made at that time to the rejection of said vote. In the year 1840, two boxes were used, and probably the same boxes used this year, labelled very conspicuously in front of the boxes.'

Mr. Caleb Church being called again by the petitioners, says:—'I am certain that I asked to change my vote, and Mr. Whitwell said I could not be permitted to do it. I do not recollect any declaration made by the selectmen of the rule which has been stated. I do not remember in which hand I held my ballots. I cannot swear, of my own knowledge, that I put my votes into the wrong box, but I think I put votes into both boxes.'

It will be perceived, from the foregoing evidence, that it becomes important to determine whether the ballot, bearing on it the name of Barker Burnell for representative to congress, found by the selectmen in the ballot-box for state officers, was cast by Caleb Church, or by some other person. If cast by Mr. Church, he having sworn that he intended to vote for the candidates, who were voted for on that day to represent the town in the then next general court, in opposition to the sitting member, then it is most clear the said ballot should have been counted; and in that case, the sitting member would not have been elected, provided the selectmen had established no vote to the contrary. But if the said ballot was cast by Lewis L. Bartlett, as testified to by Mr. Whitwell, in a manner which left no doubt on the minds of the committee, that the said Bartlett cast two votes into the box for state officers; then one of the votes cast by the said Bartlett should not have been counted, and the sitting member had a majority of all the votes cast, and was elected. Such is the opinion of the committee.

At the same time, they are not disposed to impeach, or in any way to call in question the credibility of Mr. Church, the first witness offered by the petitioners. It is not necessary to do so, in order to come to the result which the committee have arrived at; for it will be perceived by his testimony, that he swears to nothing positive, only from impressions; he does not even know that he made any mistake.

The rule established by the selectmen, and proclaimed again and again to the meeting during the day, that all ballots for state officers found in the box for United States officers, and all ballots for United States officers found in the box for state officers, would be rejected by them on counting said ballots, was, in the opinion of the committee, a salutary and indispensable rule; and not, as alleged in the petition, 'an arbitrary, unjust and illegal rule;' especially when the balloting for state and United States officers is proceeding at the same time. If such a rule can by any possibility be considered as arbitrary or unjust, it is too late to object after the balloting is finished, and the result declared.

In view of the whole evidence, the committee are of opinion that Jones Robinson, the sitting member from Fairhaven, was duly elected, and that the petitioners have leave to withdraw their petition."

The house agreed to the report of the committee, and thereupon ordered, that the petitioners have leave to withdraw their petition.[1]

VOTES FOR INELIGIBLE CANDIDATES.

The house, on the 28th of January, having ordered;[2] "That the practice that has obtained with the senate and house of representatives, when convened together for filling certain offices, of rejecting from the count ballots cast for ineligible candidates, be referred to the committee on elections, with instructions to

[1] 65 J. H. 302, 395. [2] Same, 134.

consider and report whether such practice is in accordance with the constitution and laws;" the committee reported thereon as follows[1]:—

"The practice alluded to by the order seems to have been of long standing. It is believed, however, that no case has arisen where an election by the two branches has turned upon the rejection of such votes, and the committee are apprehensive that the objections to the practice, therefore, have not been duly considered. Recent elections by the convention have shown, that it is quite possible for the title of senators to their seats to depend upon the fact, whether the practice is sound or unsound. It not being competent for the two branches, when assembled for certain elections, to go into any discussions or investigations, the committee think it desirable to have such a rule previously established, as will obviate the necessity of such discussion or investigation. And the committee beg leave to submit, that no votes should be rejected from the count simply on account of the ineligibility of the candidates voted for. The constitution undoubtedly places these, without distinction, amongst those votes, a majority of which, that instrument makes necessary to a good election. And why should they not stand upon the same footing in the count? It is a legal and proper mode of exercising the right of suffrage, if the voter choose it. It is a vote against all other candidates, eligible or ineligible. The difference between the two kinds of votes affects the candidates, not the voters. The ineligible candidate cannot avail himself of his election if he have a majority, the eligible candidate can. The constitution and laws, in the opinion of the committee, require that an election, to be good, should be sustained by more votes than are thrown for all other candidates. It is not necessary to go further and inquire into any disabilities of candidates. The house adheres to this principle, when acting as judge of the elections of its own members, and the committee believe that the principle is applied to all the elections in the state, except those by the convention of the two branches. This principle

[1] 65 J. H. 321.

is admitted and constantly acted upon in the congress of the United States, and an example may be found in the volume of 'Contested Elections in Congress,' *Washburn* v. *Ripley*, page 681. The principle was first admitted and confirmed, more than half a century since, under very memorable circumstances. In 1769, John Wilkes, Esquire, was expelled the British house of commons, and declared incapable of holding a seat therein. At a subsequent election, John Wilkes, notwithstanding his incapacity, received 1143 votes, and another candidate received 296. The commons declared Luttrell duly elected, and that the Wilkes votes were nullities, because of the incapacity or ineligibility of the candidate. This decision, recorded by parliament, convulsed the whole kingdom for twelve years, when the decision was expunged from the journals 'as being subversive of the rights of the whole body of electors of that kingdom.' The committee do not find that the principle has ever been questioned in England, since that settlement, nor do they find that it has ever been disregarded in this country, except in the instance of the two branches of our own legislature, when assembled together. But the committee think that the elections, which the two branches are required to make, are under the same authority as other elections held under the constitution, and they therefore ask leave to submit the following resolution.

Resolved, That it is not in accordance with the constitution and laws, for the two branches of the legislature, when determining elections, which they are required to make in convention, to reject from the count ballots cast for ineligible candidates."

Two of the members of the committee, (Messrs. *Russell* and *Thomas*,) dissenting from the report, presented the following reasons for their dissent[1]:—

"The fact, that the votes given for ineligible candidates, when the two houses have met in convention for the purpose of filling vacancies in certain offices, have been rejected from the count, is of long standing, and that no evil has resulted from such practise, is of itself a sufficient reason why a different rule

[1] 65 J. H. 403.

should not now be established. It is time enough to provide a remedy, when an evil is found to exist, and not in anticipation of an evil. This, it is believed, is a safe course in all cases.

But the question submitted to the committee is, whether, under the circumstances above alluded to, it is in accordance with the constitution and laws to reject votes cast for ineligible candidates. The constitution and laws of this commonwealth requiring that, in order to make an election, the candidate voted for should have a majority of all the votes or ballots given in; it becomes important to determine what is a vote or ballot? A *vote*, as defined by Johnson, is a 'a voice given and numbered;' a *ballot* is 'a little ball or ticket used in giving votes.'

Is a piece of paper bearing upon it the name of an imaginary being, (for it may as well be an imaginary being as an ineligible candidate,) deposited in the ballot-box at any election, to be counted merely because it has upon it characters in the shape of letters? Is such a piece of paper any more a vote because it has a name upon it?

The practise of rejecting blank pieces of paper, although they may have the form and shape of the actual votes which are cast, is believed to be uniform everywhere. The reason for the rejection of such a piece of paper is, that it is not 'a voice given and numbered;' that no one is designated who can be elected. It is, however, no less an expression of dissatisfaction to the candidates voted for by other persons on the one side or the other, than it would be if it bore the name of an imaginary being, or a person ineligible. In both cases it is not a vote, and should not so be treated.

So far as precedents can be found, the practise of rejecting from the count votes cast for ineligible candidates is not peculiar to the convention of the two houses in the Massachusetts legislature; it has obtained more or less in the house of representatives of the United States, and in the house of commons in Great Britain; though not always in either, or perhaps not even in a majority of cases. In short, the practise of counting or rejecting votes, cast under such circumstances, has not been

uniform, either in the United States or in Great Britain, so that nothing can be determined from precedent.

As a general principle, that all votes cast at any election by legal voters must be counted, the undersigned readily admit that very little, if any, discretion should be left to the presiding officer or officers at any election in this particular; but when a mistake, such as casting two votes, is palpable and perfectly obvious, the discretion of rejecting one may with propriety be exercised, and, in the opinion of the undersigned, should be exercised.

If it has become important, that any rule should be established concerning the counting or rejecting from the count votes cast for ineligible candidates, not only in the convention of the two houses for filling vacancies in certain offices, but in all elections in the commonwealth, the undersigned are of opinion, that the safest and best rule would be to reject from the count such votes, precisely in the same manner as blank pieces of paper are now in all cases rejected. For, if the elective franchise is worth possessing, it should be exercised with prudence, with discretion, and with judgment. It is too dear a privilege to be trifled with; it is too valuable to be made a subject of sport. Whenever, therefore, a voter shall be so lost to a sense of propriety and duty, as, through design or negligence, to cast his vote for ineligible candidates, he can have no reason to complain that his vote is not counted.

Inasmuch, therefore, as 'no case has arisen where an election by the two houses has turned upon the rejection of votes cast for ineligible candidates,' and the custom has obtained, for aught that appears, from time immemorial, to reject such votes, the undersigned take leave to submit, that the proposed resolution of the majority of the committee is uncalled for, and that no further action should be had on said order."

The report of the committee was ordered to lie on the table.

HAWLEY.

An election, at which the poll is not kept open two hours, is void.

THE (second) committee on elections, to whom was referred a petition of John Tobey and others, against the election of George Lathrop, returned a member from Hawley, reported thereon as follows:—

"That the petitioners set forth, that 'the polls were not kept open more than one hour and a half.' To support this allegation, the petitioners offer two depositions, from which the committee gather the following facts:—

John Tobey, one of the selectmen of Hawley, states in his deposition, that he attended the meeting of the inhabitants on the 28th of November last, and that the poll was not kept open more than one hour and a half, which fact 'was known by the subscriber from his noticing, both by the clock in the store and his watch, that it was past two o'clock, P. M., before he left the store to go to the meeting-house, and that the poll was not opened till some time after he arrived in the meeting-house; and after the certificate of election was made, and the meeting closed, the respondent 'returned to the said store of C. S. Longley, and found the time, both by clock and watch, to be thirty-five minutes past three, P. M.'

Austin Pease, another of the petitioners, states in his deposition, that the poll was not kept open more than one hour and a half on the 28th day of November last, at the election in Hawley. The committee are of opinion, that the not keeping of the poll open for two hours, is a violation of the law, which requires that the poll shall be kept open at least two hours. Wherefore the committee recommend the adoption of the following resolution:—

Resolved, That the seat of the member from Hawley be declared vacant."

The house agreed to the report of the committee, and thereupon by a vote of 157 to 132, declared the seat of the member from Hawley vacant.[1]

[1] 65 J. H. 330, 350.

SHARON.

The petitioners against an election having offered to prove, before the committee, that at the meeting when the same took place, the poll was not kept open two hours; but not having made any allegation in the petition to that effect, the committee were of opinion, that the objection came too late.

A person over seventy years of age, who is the owner of taxable property, which the assessors, in their discretion, exempt from taxation, on account of the age and poverty of the owner, is not entitled to vote, within the exception contained in the third article of the amendments to the constitution.

The election of Erastus Richards, returned a member from Sharon, was controverted by Joel Potter and others, on the following grounds, namely, that at the election in that town, when the sitting member was chosen, three persons, neither of whom was lawfully entitled to vote, were permitted to vote, and did vote for the sitting member; that four persons, all of whom were lawfully entitled to vote, and would have voted against the sitting member, were not permitted to vote; and that had not the selectmen received the votes of the three persons who were not legally entitled to vote, and had they permitted either of the four persons to vote who were legally entitled to vote, the said Richards would not have had a majority of all the votes.

It appeared from the record of the meeting, that the whole number of ballots was two hundred and twenty-four, of which one hundred and thirteen were necessary to a choice; and that Erastus Richards had one hundred and fourteen, and was declared to be elected.

The case being referred to the committee on elections, much evidence was given on both sides at the hearing, and reported at length by the committee; but being summed up in their report, it is not necessary to be here stated.

The petitioners also offered to prove, that "the time of opening the poll was not mentioned in the warrant, and that the poll was not kept open two hours;" but inasmuch as these allegations were not set forth in the petition, nor contained in the specifications, the committee were of opinion that they came too late, and could not now be considered.

The committee, upon the evidence in the case, came to the following conclusions:—

"The petitioners having admitted, that, to make out a case, and to show that the sitting member from the town of Sharon was not entitled to a seat in the house of representatives, they must prove to the satisfaction of the house, that he received at least one vote from a person who was not a legal voter, and had no right to vote; and that three persons at least were not permitted to vote who had a legal right so to do; and also, that, had they been permitted to vote, they would have voted against the sitting member. In weighing the evidence as to the first point, to wit: that one or more persons were permitted to vote who had no right to vote in that election, after an elaborate and able argument of the counsel who appeared for the petitioners, the committee had no difficulty in coming to the unanimous opinion, that both of the persons, whose right to vote in this election was called in question by the petitioners, were, to all intents and purposes, legal and constitutional voters. This being the opinion of the committee, the case of the petitioners fails, they not having attempted to show, that more than three persons were deprived of the privilege of voting, who had all the legal and constitutional qualifications of voters, and attempted to exercise that privilege by tendering their ballots on that occasion; the sitting member having had four votes over all other candidates voted for. Had the three persons, who were not permitted to vote, voted on that occasion, in opposition to the sitting member, still he would have had a majority of all the votes polled, and would consequently have been entitled to his seat.

The committee might here stop, and forbear giving an opinion, which would have been a more liberal extension of the right to exercise the elective franchise, than has heretofore prevailed, were it not for the opinion of the justices of the supreme judicial court, as reported in the supplement to the eleventh volume of Pickering's Reports.

But the committee, nevertheless, at the request of the parties in interest in this case, are induced to offer an opinion as to the right which Jason Gay, Edmund French, and Joseph Cummings had to vote in the election of the 28th of November last.

It was admitted on all sides, that Jason Gay was over seventy years of age, and had no taxable property; he therefore was a legal voter.

Edmund French was more than seventy years of age, was in possession of an estate, which, from his own showing, yielded an income of eleven dollars per year, and would rent for 'a dozen or fifteen dollars more.' Either one-half or one-third of said estate was his in right of his wife, during the life-time of his wife, he having no children by her. This estate was not taxed by the assessors of the town, and had not been taxed for several years, and was omitted to be taxed, as testified to by the assessors, by reason of the age and poverty of the occupant; they not even taxing the non-resident owners of the other shares held in common with the said French.

This case comes clearly within the rule, laid down by the justices of the supreme judicial court, as above referred to; it also comes within the rule, as laid down in a report of a committee of the house, composed of the members of the committee on the judiciary and the committee on matters of probate and chancery, 1840, (*ante*, 413,) which was in substance, that, 'persons more than seventy years of age, having taxable property, which the assessors, in their discretion, exempt from taxation, by reason of age, infirmity, or poverty, are not entitled to vote in such elections.'

The committee, therefore, however reluctantly, are compelled to an opinion, that the said French was not a legal voter at the November election.

Joseph Cummings was also more than seventy years of age; had not been taxed for several years; about nineteen years ago, he gave a deed to his son of his real estate in said Sharon, and took a bond for a support through life; the property was afterwards sold by his son, for $1500. He had no income, which could be taxed; he had a mere support, so that he should not be chargeable to the town. Having therefore no taxable property, and being more than seventy years of age, the said Cummings, in the opinion of the committee, was a legal voter at the election in November last.

The committee are of opinion, that the right of voting for state officers, under the constitution and laws, as they now exist in this commonwealth, is intended to depend on the payment of a poll-tax, and not on the payment of taxes on the estate of which a citizen may be possessed. This opinion is drawn from the fact, that no property qualification is required to constitute a voter. When, therefore, the law exempts a man from paying a poll-tax, whether it shall be at the age of seventy, sixty, or fifty years, from the time he shall be so exempted, he has as much a receipt for his poll-tax, for every year after he shall be so exempted, as though he had a receipt in his pocket, from the collector, for a tax duly assessed (provided he is not a town pauper), and should therefore be permitted to exercise the right of voting, in all state elections, whenever he may choose so to do.

The committee, entertaining these views of the meaning of the constitution and laws, as to taxation, would have reported that the vote of Mr. French should have been received; but, inasmuch as they cannot do so, without acting against the opinion of the justices of the supreme judicial court, before referred to, they report that the vote of Mr. French was properly excluded.

In view of the whole matter, the committee are of opinion, that Erastus Richards, the sitting member from the town of Sharon, was duly and legally elected, and therefore that the petitioners have leave to withdraw their petition."

The house agreed to the report, and the petitioners accordingly had leave to withdraw.[1]

[1] 65 J. H. 280, 288, 366, 386.

GRANBY.

An election, which was made without checking the names of the voters, was held void, although it appeared, that the selectmen knew every man, whose name was on the list, and stood by the box during the balloting, with the list before them, and made oath, that no person voted in the election, whose name was not on the list, and had not been called at the previous balloting.

THE election of Eli Moody, returned a member from this town, was controverted by William Barton, on the ground, that at the balloting when the election took place, the check list was not used.

The case being referred to the committee on elections, it was in evidence before them, by the testimony of one of the selectmen, that at the second balloting for a representative, when a choice was declared, the names of the voters were none of them checked, as they voted, either by the witness, or by the other selectmen, none of them supposing it to be necessary.

It was also in evidence, by the affidavits of all the selectmen, that at the election in question, at which they presided, on the first balloting for representative, the selectmen called the names of all the legal voters, and checked all who came forward to vote; that at the second balloting, the selectmen all stood by the ballot-box, with the check list before them, and with their eyes on the voters as they came up to vote; that they personally knew every man whose name was on the check list, and if any man had come forward to vote, whose name was not on the check list, they should have detected him at once; that they were confident that no person voted at the second balloting, whose name was not on the check list, and who had not been called; that there could be no question, but that the member returned was fairly elected at the second balloting, by a majority of the votes then cast; that from their knowledge of the persons of the voters, and from the position of the affiants when the votes were given, no person could have voted more than once at the second balloting, without being detect-

ed by the selectmen; that they were confident that, in fact, no person did vote more than once at said second balloting; and that they had never heard any suspicion expressed, by any person whatever, that the member elected had not a majority of the votes, or that any votes had been cast at that election by persons not legally qualified.

The committee reported against the validity of the election, and the house thereupon declared the seat vacant, allowing the member pay up to that time.[1]

SPENCER.

If, after the closing of the poll, objection is made that it has not been kept open two hours, and persons claim a right to vote, the poll may be opened again by a vote of the town, for the purpose.

The only ground, on which the election of the member returned from Spencer was controverted, was that the poll was not kept open two hours; and, in reference to this point, it appeared from the testimony of the sitting member, who was sworn and testified in the case, at his own request, and to save trouble to the petitioners, that he was present at the meeting, but did not know at what time the voting commenced, or when it terminated; that after the selectmen had announced that the poll was closed for the choice of representative, and had begun to count the votes, immediately persons came in, and expressed great surprise that the poll was closed, and some one standing by said, that the poll had not been kept open two hours. The selectmen, after a little conversation between themselves, stated that they had no means of knowing how long the poll had been open. Inquiry was made of the bystanders, as to the time, but no one had any means of knowing. An impression prevailed, that the poll had not been kept open two hours. The selectmen then put the question to the voters, whether the two persons claiming the right

[1] 65 J. H. 367, 381.

to vote should be allowed to do so, and it was declared to be a vote that they should, and thereupon, the box was presented to them and their votes were received.

The sitting member had a majority of eleven votes. The two persons who voted last were whigs, but whether they voted for the sitting member or not, he does not know. They were desirous to vote for governor. After the two persons who last voted had done so, the selectmen then said, "Are you now satisfied, that we have kept the poll open two hours?" and they all said "yes." The time that elapsed from the first closing of the poll, to the second closing of the poll, was ten or fifteen minutes.

The committee thereupon notified the petitioners, that they would be heard further if they desired, but the petitioners declined further action; and the committee reported, that they have leave to withdraw:—which report was agreed to.[1]

ERVING.

Where in the warrant for a town-meeting on the second Monday of November, the subject of a choice of representative is wholly omitted, this is a sufficient cause for calling a meeting for the choice of representative on the fourth Monday.

In this case, the petitioners set forth as the grounds of their case:—

"First, because no meeting of the inhabitants was called on the second Monday of November, as is provided in the constitution: and

Second, because the meeting, at which the member returned was elected, was held on the fourth Monday of November and was the first meeting for that purpose."

The committee, on inspecting the evidence offered to them, found, that from some reason, in the warrant calling the meeting of the fourteenth of November, no mention was made of

[1] 65 J. H. 376, 386.

the choice of representative, the subject being wholly omitted. There was no evidence produced to invalidate the proceedings of the twenty-eighth, at which time, there was an election of the sitting member as appears by his certificate.

The committee reported, that the petitioners have leave to withdraw :—and this report was agreed to.[1]

CHILMARK, BOLTON, NORTHBOROUGH, GOSHEN.

[In these cases, the petitioners severally offered no evidence in support of their respective allegations,—and had leave to withdraw.]

LOWELL.

[In this case, the petitioners, neglecting to appear, had leave to withdraw.]

MILTON.

[In this case, the allegation was a neglect to use the check list, and this allegation being disproved, the petitioners had leave to withdraw.]

[1] 65 J. H. 165, 228.

RESIDENCE OF STUDENTS AT A PUBLIC INSTITUTION FOR THE PURPOSES OF EDUCATION.

The mere facts, that a student, who has a domicil in one town, resides at a public institution in another town, for the sole purpose of obtaining an education, and that he has his means of support from the former, do not constitute a test of his right to vote and of his liability to be taxed in the latter town. He obtains this right and incurs this liability only by a change of domicil; and the question, whether he has changed his domicil, is to be decided by all the circumstances of the case.

"To the honorable the house of representatives of the commonwealth of Massachusetts:

The undersigned, justices of the supreme judicial court, have taken into consideration the question upon which their opinion was requested by the honorable house, by their order of the 10th of March instant, in the words following:—

'Is a residence at a public institution, in any town in this commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the constitution, which gives a person, who has his means of support from another place, either within or without this commonwealth, a right to vote, or subjects him to the liability to pay taxes in such town?'

And in answer thereto, we respectfully submit the following opinion:—

We feel considerable difficulty in giving a simple or direct answer to the question proposed, because neither of the circumstances stated constitutes a test of a person's right to vote, or liability to be taxed; nor are they very decisive circumstances bearing upon the question. On the contrary, a person may, in our opinion, reside at a public institution for the sole purpose of obtaining an education, and may have his means of support from another place, and yet he will, or will not, have a right to vote in the town where such institution is established, according to circumstances not stated in the case on which the question is proposed.

By the constitution it is declared, that, to remove all doubts concerning the meaning of the word 'inhabitant,' every person shall be considered an inhabitant, for the purpose of electing

and being elected into any office or place within this state, in that town, district, or plantation, where he dwelleth, or hath his home.

In the third article to the amendments to the constitution, made by the convention of 1820, the qualification of inhabitancy is somewhat differently expressed. The right of voting is conferred on the citizen who has resided within this commonwealth, and who has resided within the town or district, &c.

We consider these descriptions, though differing in terms, as identical in meaning, and that 'inhabitant,' mentioned in the original constitution, and 'one who has resided,' as expressed in the amendment, designate the same person. And both of these expressions, as used in the constitution and amendment, are equivalent to the familiar term *domicil*, and therefore the right of voting is confined to the place where one has his domicil, his home or place of abode.

The question, therefore, whether one residing at a place where there is a public literary institution, for the purposes of education, and who is in other respects qualified by the constitution to vote, has a right to vote there, will depend on the question whether he has a domicil there. His residence will not give him a right to vote there, if he has a domicil elsewhere; nor will his connection with a public institution, solely for the purposes of education, preclude him from so voting, being otherwise qualified, if his domicil is there.

The question, what place is any person's domicil, or place of abode, is a question of fact. It is in most cases easily determined by a few decisive facts; but cases may be readily conceived, where the circumstances tending to fix the domicil are so nearly balanced, that a slight circumstance will turn the scale. In some cases, where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicil, but for the circumstances attending the other, the intent of the party, to consider the one or the other his domicil, will determine it. One rule is, that the fact and intent must concur. Certain maxims on this subject we consider to be well settled,

which afford some aid in ascertaining one's domicil. These are, that every person has a domicil somewhere; and no person can have more than one domicil at the same time, for one and the same purpose. It follows, from these maxims, that a man retains his domicil of origin till he changes it, by acquiring another; and so each successive domicil continues, until changed by acquiring another. And it is equally obvious, that the acquisition of a new domicil does, at the same instant, terminate the preceding one.

In applying these rules to the proposed question, we take it for granted, that it was intended to apply to a case, where the student has his domicil of origin, at a place other than the town where the institution is situated. In that case, we are of opinion that his going to a public institution, and residing there solely for the purpose of education, would not, of itself, give him a right to vote there, because it would not necessarily change his domicil; but in such case, his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father; these are strong circumstances, repelling the presumption of a change of domicil. So, if he has no father living; if he has a dwelling-house of his own, or real estate, of which he retains the occupation; if he has a mother or other connections, with whom he has before been accustomed to reside, and to whose family he returns in vacations; if he describes himself as of such place, and otherwise manifests his intent to continue his domicil there; these are all circumstances tending to prove that his domicil is not changed.

But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if, having no parent, or being separated from his father's family, not being maintained or supported by him; or, if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there, without intending to return to

his former domicil; if he depends on his own property, income or industry for his support;—these are circumstances, more or less conclusive, to show a change of domicil, and the acquisition of a domicil in the town where the college is situated. In general, it may be said that an intent to change one's domicil and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would be from a like removal from one town to another, and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicil, in the one case than in the other. But where the proofs of change of domicil, drawn from the various sources already indicated, are such as to overcome the presumption of the continuance of the prior domicil, such preponderance of proof, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicil, and give him a right to vote in that town, with other municipal rights and privileges. And as liability to taxation for personal property depends on domicil, he will also be subject to taxation for his poll and general personal property, and to all other municipal duties, in the same town.

For the information of the honorable house, we respectfully refer to several decided cases, bearing upon this subject: *Amherst* v. *Granby*, 7 Mass. 1; *Putnam* v. *Johnson*, 10 Mass. 488; *Harvard College* v. *Gore*, 5 Pick. 370; *Lyman* v. *Fiske*, 17 Pick. 231; *Abington* v. *North Bridgewater*, 23 Pick. 170.

The question submitted supposes the case of a person residing at a public institution for the purpose of education, 'who has his means of support from another place, either within or without this commonwealth.'

We do not consider this circumstance of much importance in determining the domicil. If, indeed, a young man, over twenty-one years of age, is still supported by his father or mother, it is a circumstance concurring with other proofs to show that he is still a member of the family of such parent, and so may bear on the question of domicil. But if he is

emancipated from his father's family, and independent in his means of support, it is immaterial from what place his means of support are derived. If it be income from rents of real estate leased in another town, or dividends from the stock of a bank there situated, or interest of money invested on mortgage in such town, it seems to us, that this circumstance would have no influence in deciding the question of domicil, and the consequent right to vote in any town.

LEMUEL SHAW,
S. S. WILDE,
CHARLES A. DEWEY,
SAMUEL HUBBARD.

Boston, March 15, 1843."

1844.

COMMITTEE ON ELECTIONS.

Messrs. *George Wheatland*, of Salem, *Charles Theo. Russell*, of Boston, *Major S. Wilson*, of Lenox, *William Schouler*, of Lowell, *Caleb M. Long*, of Lynn, *James Rider*, of Dartmouth, *Samuel Beebe*, of Wilbraham.

CLARKSBURG.

Where the by-laws of a town required notices of town-meetings to be served by posting up "attested copies" of the warrant therefor, and the notices for a particular meeting were signed by the constable, and communicated the substance of the warrant with reasonable certainty, and in a form which had been adopted on previous occasions, though such notices were not, in a technical sense, attested copies, and indeed contained no definite proposition whatever, if grammatically considered; an election, made at the meeting so notified, was held valid.

The neglect of the officer, who served the notice for a town-meeting, to state in his return that he had served it in due season, appears to have been deemed immaterial to the validity of an election effected at such meeting.

The election of Daniel Mowry, returned from the town of

Clarksburg, was controverted[1] by Laban Clark and seven others, on three several grounds:—

First, That the town-meeting, at which said Mowry was elected, was not warned according to the by-law adopted by the town in the year 1839, which required attested copies of the warrant of the selectmen to be posted up at the school-houses in three districts in said town; (Daniel Mowry, the sitting member, being the constable to whom the warrant of the selectmen was given for service.)

Secondly, That the return of the said constable did not show that he gave any notice of said town-meeting, until the day on which it was held.

Thirdly, That the said Mowry was declared elected by a majority of one vote, while the petitioners believe that more than one illegal vote was cast for him. The petition was referred to the committee on elections on the 11th of January.[2]

It appears from the papers on file, that to support their first objection, the petitioners offered in evidence a copy, attested by the town clerk, of a vote passed by the town of Clarksburg, October 14th, 1839, which was as follows:—"Voted, That posting up attested copies of the selectmen's warrants at each of the school-houses in districts No. 1, 4, and 5, shall be the mode of warning future meetings;" and a further certificate of the said clerk, that no subsequent vote upon this subject was to be found on the records of the town.

A deposition of Eleazer Ketchum, the town clerk, was also given in evidence, and to this were attached, first, the warrant of the selectmen for the meeting at which Mowry was elected, and second, two notices of town-meetings to be held at different times on the same day, the 13th of November, 1843, the first for the choice of a representative in congress, and the second for the choice of governor, lieutenant-governor and senators, and a representative in the general court, the latter being the meeting at which Mowry was elected. These purported to be original notices, which were taken down after the meetings,

[1] 66 J H. 14. Owing to an error in filing the petition, it is entered in the journal as that of Laban Tower and others.

[2] 66 J. H. 51.

by Ketchum, as stated by him. His deposition seemed to prove satisfactorily the identity of the notices attached to it. A part of the notice for the second meeting was torn off, but it appeared to correspond in its tenor exactly with the notice for the first, which was entire, and which was as follows:—

"By virtue of a warrant from the selectmen, directed to me to notify and warn the inhabitants of the town of Clarksburg, qualified to vote in elections, to meet at the school-house in the district No. 5, on Monday, the thirteenth day of November next, at eleven o'clock in the forenoon, being the second Monday of said month, to bring in their votes to the selectmen for a representative in the congress of the United States for the seventh district.

DANIEL MOWRY, Constable.

Clarksburg, Oct. 28, 1843."

It is obvious that neither of the notices contains any distinct proposition.

Ketchum also stated in his deposition, that he had seen the notice for the second meeting before it was torn, and that it was not an attested copy of the warrant.

The deposition of Samuel Clark, which was offered in evidence, stated that he had acted as constable of the town of Clarksburg, in the years 1841 and 1842, and that the notices posted up by him for town-meetings "were both in form and substance the same as those seen by me [him] this day and annexed to the deposition of Eleazer Ketchum, of said Clarksburg, purporting to be the notices of Daniel Mowry, calling a meeting in said Clarksburg on the second Monday of November last past."

With regard to the second objection of the petitioners, the return endorsed on the warrant was offered in evidence, and was as follows:—

"*Berkshire, ss.* Pursuant to the within warrant, I have notified and warned the inhabitants of the town of Clarksburg, qualified to vote in elections and town affairs, to meet at the time and place and for the purposes therein mentioned.

DANIEL MOWRY, Constable.

Clarksburg, Nov. 13, 1843."

With regard to the point of the supposed illegal voting, no evidence was offered.

On the 24th of January, the committee reported[1] that the petitioners should have leave to withdraw, and on the 25th this report was agreed to.[2]

COLERAINE.

It seems, that the neglect of selectmen to specify, in their warrant for a meeting for the choice of representatives, the time at which the poll is to be opened, (according to the act of 1839, c. 42, § 2,) is not sufficient to invalidate an election made at such meeting.

Myrtle McGee and thirteen other voters of Coleraine petitioned against the election of Arad Towne, the member returned from Coleraine, on the ground, that the warrant calling the meeting, at which he was elected, did not state the time at which the poll was to be opened.

The petition was presented and referred to the committee on elections, on the 17th of January.[3] With the papers is filed a copy of the warrant and return, certified by the town clerk, in which there is no allusion to the time of opening the poll.

On the 24th of January, the committee reported,[4] that they had considered the subject, and that the petitioners should have leave to withdraw their petition, and on the 25th this report was agreed to.[5]

[1] 66 J. H. 124. [2] Same, 135. [3] Same, 90. [4] Same, 124. [5] Same, 135.

CHARLESTOWN.

An election, effected at a balloting which commenced after sunset, was held void, under the act of 1839, c. 42, § 3.

The act of 1843, c. 94, in addition to the act of 1839, c. 42, "concerning elections," did not repeal the third section of the latter.

A vote to dissolve a meeting having been doubted, and the doubt settled by a show of hands, the vote was again declared in the affirmative, the meeting not objecting to this mode of settling the doubt. The doubt being again renewed, the presiding officer put the question a third time, and declared it to be decided in the negative, upon a count of the voters present taken by him. It was held, that an election which took place after this proceeding, was not thereby invalidated.

THE election of Freeman F. Tilden, Richard Frothingham, Jr., Abraham Rand, and Philip B. Holmes, members returned from the town of Charlestown, was controverted by Henry P. Fairbanks and 270 others, voters of that town, on certain grounds stated in their petition; in reference to which, the committee on elections, to whom the case was referred,[1] reported as follows[2]:—

"The facts in the case are these: A meeting was held on the second Monday of November last, for the purpose of choosing representatives; the poll was opened at 9, A. M., and closed at 4, P. M.; 1532 votes were cast; necessary for a choice, 767; said Tilden received 712; said Frothingham received 689; said Rand received 229; and said Holmes received 761. After the above vote had been declared, the meeting was dissolved.

Notice was then given that a second meeting would be held on the 27th of November last, at 12 o'clock, M.

This meeting was called to order and the warrant was read, when a motion was made to dissolve the meeting, which was voted in the affirmative, 78 to 63. The vote was doubted, and the motion was again put, and the result was declared, 160 votes in favor of and 88 votes against dissolving the meeting; which last vote was also doubted by eleven persons, and to make the vote certain, it was taken by counting the voters for and against dissolving the meeting, as they passed the presiding officer; the result of which was, 335 votes in favor of, and

[1] 66 J. H. 51. [2] Same, 160.

358 votes against, dissolving the meeting. The poll was then opened, and kept open until 7 o'clock, P. M. The whole number of ballots cast was 1501; necessary for a choice, 751; said Tilden received 716; said Frothingham received 705; said Rand received 711; and said Holmes received 722 votes.

After the result of the last balloting had been declared, at 15 minutes of 8 o'clock, P. M., it was voted to proceed to another ballot for the choice of four representatives. The poll was forthwith opened, and kept open for the space of two hours, by a vote of the town. The whole number of votes cast at this balloting was 1060; necessary for a choice, 531: said Tilden received 569; said Frothingham received 567; said Rand received 567, and said Holmes received 573 votes.

The circumstances, relied upon by the petitioners to prove that the meeting was dissolved, are, that the vote was taken and declared in the affirmative, and was immediately doubted, but no one called for the polling of the house, or a division of the meeting. The chairman, to settle the doubt, counted the hands, and again stated the vote to be in the affirmative. And it is contended, that by this last act, the meeting consented to this mode of settling the doubt, and that afterwards no one had a right to call for a polling of the house. The committee are of the opinion, that there was nothing in this proceeding which should render the election void.

As to the matter of voting without the check list being used, it was given in evidence by several witnesses, that some twenty or thirty persons, whose names had not been checked, cast pieces of paper, apparently votes, into the box. It was not given in evidence, who either of the persons so voting were, or that any person voted more than once, at the same election. Several of the selectmen, and the constables on the other side, were as sure that no pieces of paper or votes were cast into the box, until the names of the voters had been checked. The committee are of the opinion, that the petitioners have not made out this point of their case.

The third allegation, which the committee think proper to notice, is one of general irregularity on the part of the meeting.

A motion was made to dissolve the meeting, after the result of the balloting, which terminated at 7 o'clock, had been declared, which created a great deal of disturbance. The meeting became disorderly in the extreme, and scenes were acted, under cover of the night, which the persons engaged in them would have been ashamed to have been engaged in, in the day time. But the committee are of opinion, that however reprehensible the conduct of a portion of the citizens might have been in this respect, yet as there was no irregularity in the voting, the seats of the sitting members for this cause should not be declared vacated.

The committee now come to the fourth, and, in the opinion of a majority of them, to the only reason why the seats of the sitting members should be declared vacated, which is, that at the ballot by which the sitting members claim to have been elected, (a previous one held on the same day having resulted in no choice,) the poll was not only continued open after sunset, but was opened, and the whole proceedings were had, after that time, contrary to the provisions of the third section of the forty-second chapter of the act passed March 9, 1839.

The second section of said act provides, that 'The warrant for notifying any such meeting shall specify the time or times when the poll for the choice of the several officers shall be opened; and the same shall be kept open at least two hours, and for such longer time as a majority of the voters present shall by vote direct; but the poll at all such elections shall be closed by sunset of the same day.'

The third section provides, that 'When a town, having a right to choose, and voting to choose, more than one representative to the general court, shall elect to choose them separately, the provisions contained in the preceding section, prescribing the time of opening and closing the poll, shall apply only to the choice of the first representative thus chosen; and in any case of balloting for a representative to the general court, if no person is elected on the first ballot, the said provisions shall not apply to any subsequent balloting for such representative on the same day; provided that the poll shall be closed by sunset.'

By the act of 1843, c. 94, passed March 24th, 1843, so much of the second section of the act concerning elections, approved on the 9th day of March, 1839, as provides for closing the polls at sunset on days of election, was thereby repealed.

Just before the balloting commenced, at which the sitting members claim to have been elected, the petitioners called the attention of the meeting to the provisions above recited, by causing the presiding officer to read them to the meeting; and remonstrated against the right of the town to open the poll and proceed to an election after sunset; but the motion to proceed to a ballot for representatives prevailed, and the petitioners, for the most part, left the meeting, and did not vote at said balloting.

A majority of the committee are of the opinion, that the act of 1843, c. 94, does not repeal the third section of the 42d chapter of the acts of 1839, but that the third section of chapter 42, passed 1839, stands now precisely the same as if the act repealing the second section of the act of 1839, chapter 42, had not been passed.

The committee therefore recommend the adoption of the following order:—

Ordered, That the seats of Freeman F. Tilden, Richard Frothingham, Jr., Absalom Rand, and Philip B. Holmes, returned as members from the town of Charlestown, be, and hereby are, declared vacant."

This report was presented to the house[1] on the 30th of January; was agreed to on the 6th of February,[2] by 165 yeas to 125 nays; and the committee on the pay roll directed to make up the pay of the members including that day.[3]

On the 9th of February, a motion that a precept should issue, for a new election in Charlestown, was made and decided in the negative.[4]

[1] 66 J. H. 160. [2] Same, 186, 190. [3] Same, 196. [4] Same, 214.

RUSSELL.

The petitioners against an election, having been notified by the committee on elections of the time appointed for hearing them, and having neglected to bring forward evidence in support of their allegations, were deemed to have abandoned their case, and had leave to withdraw their petition.

The certificate of a town clerk is not evidence of the time during which the poll at an election was kept open.

JABEZ CLARK, of Russell, petitioned against the election of Jeremiah W. Bishop, the member returned from that town, on the following grounds:—

First. That at the sixth balloting, on the second Monday of November, one Bradford W. Palmer received a majority of all the votes cast for a representative, and thereupon the selectmen declared him ineligible to the office, and the meeting was adjourned to the next day, when Mr. Bishop was elected upon the second balloting.

Second. That upon such second day the poll was not kept open more than an hour for both ballotings.

The petition was presented and referred to the committee on elections, on the 23d day of January.[1] On the 7th of February, the committee reported,[2] that they had notified the petitioners of the time appointed for hearing them, but although that time had long elapsed, no evidence had been offered against the member, and therefore that the petitioners should have leave to withdraw their petition.

There is filed, with the papers in the case, what purports to be a certified copy of the record of the two meetings, containing a statement of the result of each balloting on the two days above-mentioned; and the town clerk also certifies, at the foot of the petition, that the statement of the votes contained therein is correct, and according to the record, and that the poll was open but about an hour for both ballotings.

The report of the committee was agreed to on the 13th of February.[3]

[1] 66 J. H. 115. [2] Same, 210. [3] Same, 248, 249.

SANDWICH.

Under the Statute of 1839, c. 42, "concerning elections," an election made at a second balloting, at which the poll is kept open after sunset, is void.

Where the cases of two members, voted for at the same balloting, stood upon the same ground, the fact that one of them was too sick to attend to, or even be informed of, the petition against their election, did not prevent the committee from hearing and deciding the cases of both.

Pay allowed to members whose seats were vacated, and expenses of sickness also to one of them.

THE petition in this case, (referred to the committee on elections, February 10th,) was very brief, and is substantially copied in the following report,[1] made on the 17th of February :—

"The committee on elections, to whom was referred[2] the petition of William E. Boyden and sixty others, citizens of Sandwich, against the right of Benjamin Bourne and Asahel Cobb, the sitting members from that town, to seats in this house, submit the following report:—The ground, upon which the petitioners in this case ask that the seats of the sitting members may be vacated, is, that 'they were chosen after sunset on the day of election, and of consequence, in violation of the law of the commonwealth.'

Soon after this petition was referred to them, the committee gave notice to the member who presented it, of their readiness to hear the parties, and on Thursday last, Mr. Joseph Nye, one of the petitioners, and acting in their behalf, appeared before the committee. On that day, also, notice of the intention of the committee to proceed to a hearing was given to Mr. Bourne, one of the sitting members. No notice was given to Mr. Cobb, for reasons that will appear hereafter. Mr. Bourne was present before the committee.

It will be seen, that the petition simply states, that the sitting members 'were chosen after sunset, in violation of the law,' without setting forth whether the election was upon a first or a second balloting. As the third section of the law of 1839, concerning elections, in the provisions touching this elec-

[1] 66 J. H. 289. [2] Same, 223.

tion, relates only to the second and subsequent ballotings, the petition upon its face would not state a case for unseating these members, were it not for the general allegation that they were chosen 'in violation of law.' Under this specification, the petitioners introduced as a witness the said Joseph Nye, and by his testimony it appeared, that the meeting for the choice of representatives to the general court, and for the purposes of the general election in the commonwealth, was holden in Sandwich on the thirteenth day of November last; that one unsuccessful balloting for said representatives was had, the sitting members then wanting some twenty or more votes of an election; that a second balloting was then had, at which these members had a small majority of the votes cast; that in this second balloting the poll was opened just after sunset, and kept open nearly two hours, being closed between seven and eight o'clock in the evening; and thus that all the balloting was after sunset.

Mr. Bourne offered no evidence to the committee. He, however, asked for delay to send to Sandwich. But as he did not state what additional fact he would thus prove, or what statement of this witness, excepting that the polls were opened as well as kept open after sunset, he would disprove, the committee, not deeming this exception material, did not grant the request. Mr. Bourne neither admitted nor denied that the poll was kept open after sunset, leaving the petitioners to prove their case.

It also appeared that Mr. Cobb, the other sitting member, has been for some time dangerously sick, confined to his room and bed, and wholly unable to attend to any business. It has not therefore been thought proper by his friends and attendants, to mention the subject of this petition to him, and he is not aware, as your committee are informed, that any such petition has been presented. Mr. Bourne expressed a strong desire, that no action should be had until Mr. Cobb could be apprised of it, and expressed a hope that he could converse with him on the subject on that or the next day. The committee unanimously decided to postpone further proceedings

till Friday afternoon. Mr. Bourne and Mr. Nye then again appeared, and it was ascertained that the friends of Mr. Cobb did not deem it prudent to name the subject to him, although he was then somewhat better. It was hoped by them, that he might be able next week to attend to this matter, though there is little prospect that he will be able to appear before the committee or in the house during the session.

Under these circumstances the committee were embarrassed, as to the proper course to be pursued. On the one hand, they did not wish to decide upon a matter of so grave importance, without a full hearing of the party interested. On the other, they were impressed with the necessity of deciding cases like this at the earliest possible time, consistent with a due regard to the rights of all concerned. In view of this latter consideration, they have determined to submit their report to the house, without delay on Mr. Cobb's account; stating the fact that he has not been either personally present or represented before them.

So far as there is any evidence before the committee, it appears that both the sitting members were elected upon *one* and a *second* balloting, a previous one having resulted in no choice; that at this balloting the poll was kept open after sunset, in contravention of the provisions of the third section of the act of 1839, c. 42, entitled 'an act concerning elections.' Upon this ground, therefore, they submit the following order:

Ordered, That the seats of Benjamin Bourne and Asahel Cobb, the sitting members of this house from the town of Sandwich, be, and they hereby are, declared vacant."

The foregoing report was agreed to, and the seats of those gentlemen declared vacant, on the 21st of February, by yeas, 153, nays, 129.[1]

On the succeeding day, the pay of Messrs. Bourne and Cobb was ordered to be made up to and including that day.[2]

An additional allowance of one hundred dollars was afterwards made to Mr. Cobb, in consideration of the expenses of his sickness, by the resolve of 1844, c. 71.[3]

[1] 66 J. H. 315. [2] Same, 316, 319. [3] Same, 322.

WILLIAMSTOWN.

If petitioners fail, after due notice, to present evidence in support of their case, they will be deemed to have abandoned it.

It seems, that a certificate of the selectmen and clerk of a town, stating what occurred at a meeting at which they officiated, is not evidence.

WILLIAM WATERMAN and twenty others, voters of Williamstown, petitioned against the right of Amasa Shattuck, the member returned from that town, to a seat in the house, on the ground, that the balloting, at which he was elected, had been commenced and concluded after sunset on the day of election, and after the selectmen of the town had given notice, that the poll would be open on the next day for the reception of votes for a representative.

With the papers in the case is filed, what purports to be a certificate of the selectmen and clerk of the town, dated February 9th, in support of the allegations contained in the petition.

The petition was presented and referred to the committee on elections, on the 13th of February.[1] On the 29th of that month, the committee reported, that they had notified the petitioners of the time appointed for the hearing of the case, and that although that time had passed, no evidence on the subject had been offered. The committee thereupon recommended, that leave to withdraw should be granted to the petitioners; and this report was agreed to[2] on the same day.

WEBSTER.

P. removed from Dudley to Webster, in October, 1842, and was employed in Webster up to the time of the election in 1843, intending during all that time to remove his family to W., as soon as he could find suitable accommodations for them. He did not in fact remove them before August, 1843. It was held, that he was not a legal voter in Webster at that election.

After a report, granting to petitioners against an election leave to withdraw, had been agreed to, and the time had elapsed within which the vote could be reconsidered,

[1] 66 J. H. 248. [2] Same, 365.

the house recommitted the report to a committee, and, after considering a new report made by them, declared the seat in question vacant.

M. applied to one of the selectmen on the morning before an election to have his name put on the list of voters. A friend applied, also, in his behalf, for the same purpose, to another selectman. Both those officers promised to put the name on the list, but omitted to do so. M.'s vote, however, was received at the poll; but upon its appearing that his name was not on the list, he was directed to remove his vote from the ballot-box, and did so. It was held, that M. was a legal voter, and that his vote was wrongfully rejected.

The election of Solomon Robinson, returned as a member from the town of Webster, was controverted by Jonathan Day and others, on the ground, that the selectmen permitted three persons to vote at the election, who had no right to vote, and who voted for said Robinson; and would not suffer three persons to vote, who, if they had been allowed to vote, would have voted against said Robinson; and that if such persons voting had not been allowed to do so, and such persons as were not allowed to vote had been allowed, the said Robinson would not have been elected.

The three persons alleged to have voted illegally were Jotham Eddy, Oliver W. Adams and Elijah Pratt.

The three persons, whose votes were alleged to have been illegally rejected, were Harvey Wood, Alvan Child and Bradford Marcy.

Jotham Eddy gave in evidence, that on the 15th day of May, 1843, he removed from Dudley to Webster, and voted for Mr. Robinson as representative, on the 13th of November, 1843.

Oliver W. Adams testified, that he removed from Southbridge to Webster, on the 15th day of May, 1843, and voted for Robinson as representative, on the 13th day of November last, at Webster.

Elijah Pratt deposed as follows: 'I came from Dudley to Webster to work, in October, 1842. I boarded during the week in the village, and returned home and spent the Sabbath with my family in Dudley and at church in Webster. I always intended to remove my family to Webster as soon as I could get a desirable tenement, but was prevented by sickness and other causes. In August or September, 1843, I purchased a house in Webster, and removed my family from Dudley to Webster on the 2d day of October, 1843; I am now in the employ of Messrs. Slaters, and have been ever since October, 1842. I voted for Solomon Robinson as representative from Webster, on the 13th day of November, 1843.'

Harvey Wood testified, that on the 13th of November, 1843, he voted in Webster for governor, lieutenant-governor and senators, and retired to the opposite side of the hall, where he was informed that they were voting for a representative to the general court at the same time; he then repaired to the desk of the selectmen, and was about

to deposit a vote for representative, but was refused; he would have voted against Robinson.

Alvan Child deposed as follows: 'I have been a resident of Webster for several years; in November last, at the town-meeting for the choice of governor, lieutenant-governor, senators, and representative to the general court, my name was called by the chairman of the board of selectmen as a legal voter, and I supposed I was a legal voter, having paid a tax within two years. I voted for governor, lieutenant-governor, senators and representative. After I had deposited my votes, my right to vote was challenged, on the ground that I had not paid a tax assessed within two years. I then immediately paid my tax for 1843, and the selectmen turned the ballot-box and commenced calling the list of voters as before; and when they came to my name they refused to let me vote, and I did not vote. I should have voted for Calvin Chamberlain as representative to the general court from this town.'

Bradford Marcy deposed as follows: 'I removed into the town of Webster the fore part of April, 1843, from Dudley. I paid a tax assessed against me in Dudley in 1842; on the morning of the 13th of November, 1843, Mr. Dyer Freeman, one of the selectmen of Webster, asked me if I wished my name inserted on the list of voters of Webster. I told him I did want it on, saying I had not paid the tax against me in Webster, but had my receipt for the payment of my tax last year in Dudley. He, Mr. Freeman, then said, I will see that your name is put on the list of voters. Near the close of the meeting, I went to the desk of the selectmen, and the chairman of the board said my name was on the list. I accordingly deposited my votes for governor, lieutenant-governor, senators, and for a representative. He then looked for my name on the list and found it had not been inserted. He then said I must take my vote out of the boxes, which I did, supposing I must. I should have voted for Calvin Chamberlain.'

It was also given in evidence, that one James O. Tourtelott, a single person, went to Webster in September, 1842, from Connecticut, to work, boarded in Webster until the 1st of May, 1843, and then accompanied the family he had boarded with to Dudley, where he continued to board with this family till the last of August following, when the family with whom he was boarding removed back to Webster, and he accompanied them, and continued in Webster until after the election in November last.

The family, with whom Tourtelott boarded when they removed to Dudley, had no idea of making other than a temporary residence there.

Tourtelott was assessed a tax in Dudley in May last, and paid his tax there, which was the only tax he had ever paid in this state. During the four months in which he lived in Dudley, he worked in Webster, and on the thirteenth day of November last, he voted in Webster for Calvin Chamberlain as representative to the general court.

The selectmen gave in evidence, that although the name of Alvan Child was on the check list, yet as he had not paid a tax within two years, his vote was challenged, and on that ground, rejected, and his name was stricken from the list of voters; afterwards another person paid his (Child's) tax, and he again claimed his right to vote, but it was rejected, it being too late to insert his name again upon the list of voters after the poll was opened.

They likewise gave in evidence, that Bradford Marcy's name was not on the list of voters, no evidence having been brought before the board of selectmen previous to the opening of the poll that he had the requisite qualifications.

With regard to the case of Wood, the selectmen said that when his name was

called, 'he came forward and voted and his name was checked on the list, but whether he voted for representative or not we cannot say.'

The whole number of votes cast was 224, Solomon Robinson had 114, and was declared elected, 113 being necessary for a choice.

A majority of the committee on elections, to whom the subject was referred,[1] were of opinion that the votes of Eddy, Tourtelott, and Adams should have been rejected, and that the vote of Child should have been received, which would give the following result.

To the 224 votes received, add Child's, and the whole number is 225; deduct Eddy's, Adams's, and Tourtelott's, and 222 remain; necessary for a choice, 112; Robinson had 114; or after deducting Eddy's and Adams's, 112.

The majority, therefore, on the 4th of March recommended that the petitioners have leave to withdraw their petition.

A minority of the committee, dissenting from the views of the majority, made a separate report.[2] This report admits that the votes of Eddy and Adams should have been rejected and the vote of Child received, but contends that the vote of Pratt also should have been rejected, and that of Marcy received. It considers Tourtellott to have been a legal voter, though in the view of the minority the question, whether he was, or was not such, could not affect the result. The argument and conclusion of the minority are thus stated:—

"Was Elijah Pratt a legal voter in Webster? The minority are clear he was not, for lack of six months residence in Webster.

Did Pratt move to Webster, or change his 'home' from Dudley, till he moved his family? Clearly not. No man loses an old and acquires a new residence, until his intention of changing his residence ceases to be in suspense, and becomes fixed. If the removal depends on any contingency or doubt, the residence is not changed till the contingency ceases. Pratt had his family and home in Dudley. He went to Webster to work there. He says he went 'home' to Dudley every week

[1] 66 J. H. 51. [2] Same, 437.

to his family. He intended to remove his family, provided he could get a tenement in Webster. Until he got a tenement his intention was not fixed, nor carried into effect, and no more changed his residence than if he had remained over the line in Dudley, with his family, intending to remove in case he could find a tenement in Webster.

Take a common case. A man, with a family in New Hampshire, comes to work in Massachusetts. He intends to remove his family, provided he can find work, or make a long contract, or get a house, or any other contingency. A month before an election, he makes up his mind to remove, and brings down his family. Has he had a year's residence in Massachusetts? Clearly not. He is not detached from his residence in New Hampshire, until the contingency, as to his intention of moving his family, ceases. When that ceases, and the intention is carried into effect, the residence is changed, and not before. By the same rule, Pratt had not resided six months in Webster. Suppose he had not removed his family until after the election? Would he have been a voter in Webster in 1843? Clearly not. He went to Webster to work in October, 1842. Does any one doubt that he was a voter in Dudley, in November, 1843, where it is understood he actually did vote that year? But by the rule of the majority, the moment he moved his family to Webster, in October, 1843, his residence dated back to October, 1842; the problem is, where did he reside in the mean time? If he had not moved his family, nor taken a house, his residence would have continued in Dudley, and thus Pratt, who by law was an actual resident and a voter in Dudley, in November, 1842, where his house was, is now made out by the retraction of this removal, to have been a resident of Webster, while actually a resident of Dudley; or else to get rid of this absurdity, it must be said that his residence was suspended between Dudley and Webster, from October, 1842, though he had made up his mind to move his family. This is impossible, and we ask the house to pause before they establish this loose rule of residence upon an uncertainty, while he leaves his family at home, and is making

up his mind whether to move them or not, or until he does make up his mind to remove them without any contingency, which throws all notions of a fixed domicil into confusion. Clearly then Pratt was not a voter in Webster. The same rule, by which the majority bring him in, might just as well bring in Eddy, for he bought land in Webster, with a view to build a house in 1842, and resided in Webster till he removed his family there, on the 15th of May, 1843. The committee rightfully exclude him; but if actual removal, coupled with a previous contingent but not fixed intention, as in Pratt's case, is to date back five months, why not date back Eddy's removal eighteen months?

The next inquiry is, was Marcy's vote illegally rejected? It is admitted he had all the qualifications. On the morning of the election, one of the selectmen, upon Marcy's application, promised to put his name on the list of voters. Mr. Jonathan Day testified before the committee, that on the morning of the election, he also made the request, for Marcy, to the chairman of the selectmen, to put his name on, and he said it should be on. This is positive proof, that he did all the law requires to have his name put on. The selectmen say he did not offer evidence of his qualifications, but both he and Mr. Day, for him, applied to have his name put on, and they said it should be put on; and so strongly were the selectmen impressed with the belief that his name was on the list, as the chairman had promised, that when he asked if his name was on, they said, yes, and actually received his vote.

Will the selectmen of Webster say, that they intentionally deceived Marcy? Of course not; but is a citizen, on applying to have his name put on the list, to be told by one or more of the selectmen, that his name shall go on, and while he offers to vote be told it is on, and then find it not on after all, and thus be decieved out of his vote; and the ground taken by the selectmen, that he did not offer evidence of qualifications, when they had previously told him that they were satisfied of his qualifications?

The only possible doubt as to Marcy's right to vote is, did

he waive his right by withdrawing his vote, after it was deposited; which he did by compulsion for fear of prosecution. He swears he withdrew his vote by direction of the selectmen, because he thought he must. And, in fact, if he had persisted, after he knew his name was not on, he was liable for illegal voting, his name not being on the list; for the law is explicit, that the ballot of no voter shall be received unless his name is first placed on the list.

The selectmen, after they had promised, neglected to put it on, and thus deprived him of his right to vote, which he did not lose by withdrawing his vote, but by their neglect, or refusal, to put his name on the list, without which he could not vote. If Marcy was misled, in the first instance, by the selectmen, as to putting his name on the list, and again misled by being told by them he must withdraw his vote, would it not be allowing a double wrong to sanction the rejection of his vote?

We think it impossible to come to any other conclusion, than that Pratt was not, and Marcy was, a voter. This would give the result as follows:—

Whole number of votes, - - - - - - - -	224
Add Child's and Marcy's, illegally rejected, - - - -	2
Whole number, - - - - - - - -	226
Deduct Eddy's, Adams's and Pratt's, - - - - -	3
Whole number, - - - - - - - -	223

Necessary to a choice, 112. Deduct from 114, for Mr. Robinson, Eddy's, Adams's, and Pratt's, 3, and he has but 111, and is not chosen. If Tourtellott's is also rejected, it makes the whole number 222, still requiring 112 for a choice. The minority therefore report the following:—

Resolved, That the seat of Solomon Robinson, the sitting member from Webster, is hereby declared vacated."

The petition was presented on the 8th of January,[1] and referred to the committee on the 11th.[2] On the 31st the com-

[1] 66 J. H. 22. [2] Same, 51.

mittee made a report concluding with leave to withdraw,[1] which was agreed to on the 12th of February.[2] On the 17th, however, (though the house had been in session on every intervening day) the petition was taken from the files and recommitted to the same committee,[3] who on the 15th of March, again reported leave to withdraw.[4] On the 8th, the report of the minority was submitted to the house,[5] and ordered to be printed with the report of the committee. The subject was considered on the 14th of March, and the report was amended by striking out its conclusion, and inserting that of the report of the minority, the question being taken by yeas and nays, and there being yeas 161, nays 118,[6] and as thus amended it was agreed to.[7]

On the 15th of March the house ordered, that pay should be allowed to Mr. Robinson up to and including that date.[8]

FALL RIVER.

At a meeting for the election of representative, held subsequently to the passing of the act of 1843, c. 94, the poll was opened at 9 o'clock in the forenoon, and kept open by a vote of the meeting, until after sunset; it was held, that the election was not thereby invalidated.

THE petition in this case, signed by James G. Bowen and 38 others, stated, among various immaterial allegations, that, at the second meeting of the voters of the town, held on the fourth Monday of November, after due notice:—

"The inhabitants assembled at nine o'clock, A. M., and commenced balloting. At about five o'clock, P. M., a motion was made to close the poll at six o'clock, P. M., which was carried nearly unanimously, all understanding at the time that the sunset law (st. 1839, c. 42) had been repealed. Had the poll been closed at sunset, when the motion was made fixing the time of closing it at six o'clock, P. M., it is believed, that no representatives would have been chosen, and

[1] 66 J. H. 167. [2] Same, 238. [3] Same, 285. [4] Same, 404. [5] Same, 437.
[6] Same, 499. [7] Same, 500. [8] Same, 502.

consequently that the majority which the persons elected had was obtained after sunset."

The petition was referred to the committee on elections on the 2d of March.[1] On the 4th of the same month, that committee reported,[2] that the petitioners had not assigned any reason in their petition, why the sitting members should not be entitled to their seats, and therefore recommended that they should have leave to withdraw their petition; and this report was agreed to,[2] on the day on which it was made.

SOUTH HADLEY.

If petitioners fail, after due notice, to present evidence in support of their case, they will be considered as abandoning it.

THE petition of Alpheus Ingraham and six others, against the election of Erastus T. Smith, the member returned from South Hadley, alleged that the selectmen had neglected to count seven votes which should have been counted. It was presented and referred to the committee on elections on the 9th of March.[3] On the 21st of the same month, the committee reported,[4] that the petitioners had been duly notified to present evidence in support of their case, but no communication whatever had been received from them. In the absence of any statement from the petitioners, the committee conjectured, that the imputed error of the town officers had arisen from the fact, that the seven votes in question, which bore the names of the respective candidates for the office of representative in congress from the district of which South Hadley formed a part, had been by mistake deposited in the ballot-box appropriated exclusively to the votes for representative in the general court. The committee founded their report, however, simply upon the fact that the petitioners had not appeared after due notice, and unanimously recommended that they should have leave to withdraw their petition; and this report was read and agreed to,[5] on the first day of March ensuing.

[1] 66 J. H. 382. [2] Same, 399. [3] Same, 216. [4] Same, 316. [5] Same, 376.

EXEMPTION FROM TAXATION ON ACCOUNT OF POVERTY.

Persons, who have been exempted from taxation on account of their poverty, under the provisions of the eighth clause of the 5th section of the Rev. Sts., c. 7, and St. 1843, c. 87, § 1, for two successive years before their arrival at the age of seventy, are not entitled to vote in the election of governor, lieutenant-governor, senators, and representatives, under the third article of the amendments to the constitution, as persons exempted by law from taxation.

On the second day of March, 1844, the committee on the judiciary reported[1] to the house, upon an order of the 23d of January,[2] that the question upon which the following opinion is given, and which is stated in the opinion, should be proposed to the justices of the supreme judicial court, and this report was agreed to[3] on the 4th of March. On the 12th of March the opinion was received,[4] and ordered to be printed.

"The undersigned, justices of the supreme judicial court, have received the order of the honorable house, passed on the second of March, eighteen hundred and forty-four, requesting their opinion upon the following question:—

'Is a person, who has the requisite qualifications as to residence, but who has been exempted from taxation on account of his poverty two successive years before his arrival at the age of seventy years, entitled to vote in the election of governor, lieutenant-governor, senators and representatives, after his arrival at that age?'

In answer to this question, we cheerfully submit the following opinion.

A just answer to the question must depend upon a true construction of the third article of the amendments to the constitution of the commonwealth, and the laws, to which that article refers, in order to determine the qualifications of voters. This article extends the right of voting, in the elections mentioned, to every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, having certain qualifications of residence, and who shall have

[1] 66 J. H. 384. [2] Same, 114. [3] Same, 402. [4] Same, 460.

paid by himself, or his parent, master or guardian, any state or county tax assessed upon him within two years preceding, in any town or district of the commonwealth; and also to every person, who being otherwise qualified, shall be by law exempted from taxation. This provision of the constitution, being irrepealable by any act of ordinary legislation, must be obeyed and carried into effect according to its plain intent and meaning, as far as that can be ascertained. One of these requisites, to qualify the citizen to vote, is, that he shall have paid some state or county tax assessed upon him within the state, within two years preceding the election, or be by law exempted from taxation. In requiring the payment of a tax, the constitution makes no distinction between a poll-tax and a tax on the person in respect to his real or personal estate.

The question supposes the case of a person, who, for two years before arriving at the age of seventy years, has been wholly exempted from taxation on account of his poverty. It follows, that until he shall be taxed for property, he cannot have paid any tax assessed on him within two years, previous to the election, at which he may claim a right to vote, and cannot therefore establish his right upon that branch of the provision. The only question therefore, is, whether he is a person exempted by law from taxation, within the other clause in this article of the constitution.

In reference to this question, we ask leave to refer to an opinion, given by the justices of the supreme judicial court, in February, eighteen hundred and thirty-two, signed by two of the subscribers, and in which the undersigned all concur. This opinion will be found in 11 Pickering's Reports, 538, (*ante*, 285,) and we think it goes far towards deciding the present case. The opinion then expressed was, that persons exempted under the discretionary authority of the assessors, as persons who by reason of age, infirmity or poverty, are unable to contribute towards the public charges, are not persons exempted by law from taxation, within the meaning of this clause in the constitution. We then considered, and still consider, for the reasons there stated more at length, that the constitution had reference

to a class of persons acting in capacities beneficial to the community, such as ministers of the gospel, instructors in public seminaries, and the like, persons to whom such exemption had been granted by law, as one mode of making up their compensation for services. And although this class of persons exempted by law has been diminished by succeeding legislation, it does not alter the meaning of the constitution in this respect. Looking therefore to the probable purpose and intent of the makers of the constitution, and the terms in which they have expressed their intent; we are of opinion, that the persons who are annually and temporarily exempted by the assessors from taxation, by reason of their poverty and inability to contribute to the public revenue, are not persons exempted by law from taxation, who are entitled to vote without payment of any tax.

These considerations apply to all persons of whatever age, who, are by the discretionary power of the assessors, excused from taxation on account of infirmity, or poverty. But the specific question is, whether persons of seventy years of age and over, who have paid no tax assessed on them within two years before, because they have been exempted on account of age, infirmity, or poverty, can exercise the right of voting. No difference in this respect exists between persons of seventy years old and upwards, and those under that age, except that by the law as it now stands, persons of seventy and upwards are not liable to be taxed for their polls. In this respect some change has been made in the law, since the opinion was expressed in eighteen hundred and thirty-two. Before that time, the subject was usually regulated by the annual tax act, and the specific provision therein referred to was contained in the then last tax act, Stat. 1831, c. 151, by which all male citizens of sixteen years old and upwards were liable to a poll-tax. In one other particular, the law has undergone a slight change of form. As the law formerly stood, the provision that if there were any persons, who, by reason of age, infirmity, or poverty, might be unable to contribute towards the public charges, in the judgment of the assessors, they might exempt the polls and estates of such persons, or abate any part of what they

were assessed, was usually embraced in the tax act; but now by the Revised Statutes, c. 7, § 5, 8th clause, the provision is made part of the permanent law regulating taxation. The reason probably is, that formerly it was usual to have a state tax annually, in which these clauses were introduced, and the general law in respect to town and county taxes directed, that assessors should conform to the then last state tax-act, in assessing county and town taxes. But in eighteen hundred and thirty-five, when the Revised Statutes were prepared, a state tax had become more unfrequent, and it became therefore convenient that the general provisions, in regard to town and county taxes, should be embraced in the body of the laws, to be made complete, and furnished to the officers and people of the commonwealth, instead of referring to tax-acts, which might be passed, if at all, at long intervals only. But the power thus humanely given to assessors to exempt individual persons, unable by reason of poverty to contribute to the public charges, was of precisely the same nature and extent then as now, and the law was similar in effect, and substantially so in terms; and we think therefore that this exemption is still a temporary indulgence and excuse from the payment of taxes, allowed at the discretion of assessors, and that the persons thus excused are not persons exempted by law from taxation.

And we are also of opinion, that the modification of the law, determining what persons shall be liable to a poll-tax, can make no difference in respect to the right of voting. Formerly, all persons of sixteen years old and upwards, were taxable for their polls. By the Revised Statutes, it was reduced and limited to persons from sixteen to seventy years old, and by the statute of 1843, c. 87, it was again reduced to persons from twenty to seventy.

But whilst persons of all ages are liable generally to taxation for property, those over seventy cannot be said to be exempted by law from taxation, merely because they are no longer liable for a poll-tax. It is the liability to taxation, not the want of taxable property, which distinguishes citizens generally from citizens exempted by law from taxation. The

exemption by law contemplated by the constitution is an exemption from all taxation, without any distinction between a poll-tax and any other tax. Persons over seventy, therefore, although not liable to a poll-tax, because the law does not make their polls taxable, are still liable in common with others to all other taxes; and if not actually taxed in any one year, it is because they happen to have no taxable property. Such want of taxable property may be temporary or casual, and such persons may at any time acquire property, by inheritance or otherwise, and would then be taxable, and so they are not exempted by law from taxation. Upon any other construction, if the legislature were still further to limit the number of persons liable to a poll-tax, and if all such persons, not happening to have taxable property, and so not being assessed in fact for any tax, should be permitted to vote, it would, in our opinion, be repugnant to the constitution, which requires either the actual payment of a tax, or that the person shall be of some class having a general exemption by law from taxation. Suppose the legislature should, for some good reason, enact that persons between thirty and seventy, and no others, should be taxed for polls; there would be a class of persons between twenty-one and thirty, who would be entitled by age and residence to vote, and in regard to whom it could not be pretended that they were exempted by law from taxation. Their right to vote, then, by the plain and express terms of the constitution, would depend upon the payment of some tax, and there being no poll-tax, it must of course be the payment of a tax on property. So if the legislature were to take off the poll-tax altogether, it could not be said that all persons having, at any particular time, no taxable property, would be exempted by law from taxation; therefore, to come within the other provision of the constitution, they must actually pay a tax to enable them to vote, and such, in the absence of all poll-taxes, must be a property tax. We are, therefore, of opinion, that persons over seventy years of age are no more entitled, on that account, than any other persons, to vote, without the actual payment of a tax, although on account of the change of the

law they are not liable to a poll-tax. And it makes no difference that such persons have, during the two years before arriving at seventy, or before or after that time, been exempted by the discretionary power of the assessors, on account of poverty, from being assessed or charged with the payment of any tax. All such persons may acquire property by inheritance or otherwise, and being always liable by law to taxation, may, in respect to such acquired property, be actually taxed. But as the constitution expressly requires, that, in order to be qualified to vote, a person must actually have paid a tax, or be exempted by law from taxation, we are of opinion, that persons seventy years old, though not liable to be taxed for their polls, are not thereby exempted by law from taxation, and therefore that they are not entitled to vote without the actual payment of some other tax.

LEMUEL SHAW,
S. S. WILDE,
CHARLES A. DEWEY,
SAMUEL HUBBARD.

Boston, March 9, 1844."

1845.

COMMITTEE ON ELECTIONS.

Messrs. *Thomas Tolman*, of Boston, *John S. Ladd*, of Cambridge, *Shubael P. Adams*, of Lowell, *Benjamin Mayo*, of Orange, *James Rider*, of Dartmouth, *John I. Baker*, of Beverly, *O. S. Kingsbury*, of Mansfield.

CERTIFICATES OF MEMBERS.

The omission of a return upon the certificate of a representative, stating that he has been duly notified of his election and summoned to attend the general court, does not affect the validity of the election or of the return.

On the seventh of January, 1845, the certificates of the members of the house were referred[1] to the committee on elections.

On the 15th the committee reported,[2] that they had examined the same and compared the certificates of election transmitted to the secretary, in compliance with the provisions of the Act of 1844, c. 143, "concerning the organization of the house of representatives," with those received from the members.

The report then proceeds as follows:—

"The eighth section of the fifth chapter of the Revised Statutes makes it the duty of the selectmen of towns, within three days after the election of a representative, either by a constable or some other person by them specially authorized, to give notice of the choice to the person elected, and the tenth section of the same chapter provides, that the certificate of the person chosen shall have a return thereon, signed by the constable or other person specially authorized to give notice, stating that notice of the choice was given to the person elected, and that said person was summoned to attend the general court accordingly. All the certificates examined by the committee, except two, contain returns stating that the person or persons elected were duly notified and summoned. In one of the cases, where no such return was made by a constable or person specially authorized, there is an endorsement on the certificate that the representative elected, 'being himself the constable of the town,' was notified and summoned by the selectmen. In the other case, there being no such return on the certificate, the committee have ascertained from the sitting member, that being himself one of the selectmen, notice and summons were deemed unnecessary.

[1] 67 J. H. 48. [2] Same, 101.

While the committee would recommend to town officers a strict compliance in all cases with the provisions of law relating to elections, they, at the same time are of opinion, that where a certificate, signed by the selectmen, corresponds substantially with the requirements contained in the ninth section of the fifth chapter of the Revised Statutes, it is to be received as *prima facie* evidence of an election, although it may not have a return thereon required by the tenth section of the same chapter.

The design of the law seems to be to give the representative official information of his election, and for that purpose, it imposes a duty on certain officers of the town. But if that duty has been neglected, if the person chosen has not been notified and summoned, the defect seems to be supplied by his appearing and taking his seat in the house; otherwise it might be in the power of town officers, by their own delinquency, to infringe the rights of a representative who had been legally chosen.

This construction of the law, so far as the committee have been able to ascertain, has been adopted by the house heretofore. They therefore report that all the certificates which they have examined are correct in form."

This report was forthwith agreed to.[1]

Note. At the next session, in 1846, the committee on elections made a report upon the returns of the members of the house, referring to the foregoing, and taking similar ground in regard to three cases in which the members had not been duly notified, and that report was agreed to as soon as made.[2]

[1] 67 J. H. 101. [2] 68 J. H. 11, 37.

1846.

COMMITTEE ON ELECTIONS.

Messrs. *Thomas Tolman*, of Boston, *John S. Ladd*, of Cambridge, *Benjamin Mayo*, of Orange, *John I. Baker*, of Beverly, *James Rider*, of Dartmouth, *John A. Morton* of Hadley, *Isaac Burrows*, of Bernardston.

CASE OF JAMES M. FREEMAN, PETITIONER.

The second section of the act of 1839 c. 42, providing that the warrant for notifying a meeting for the choice of certain officers shall specify the time when the poll shall be opened, is to be considered as directory to town officers; and the omission of such specification in the warrant subjects the selectmen to the penalty provided in the act; but, except in cases of fraud, will not invalidate an election made at a meeting held in pursuance of such warrant.

The fact, that a person who claims to have been elected a representative at a meeting, at the close of which the presiding officers declared that no choice had been effected, was a candidate for the same office at a subsequent meeting, cannot impair any right acquired by him at the former meeting.

After the result of an election has been declared, it is proper for the selectmen to add to the whole number of votes, one that has accidentally escaped notice, and thereupon to make a new declaration, although the result of the election is thereby changed.

The omission, in a warrant for a meeting for the choice of representative, of an article to determine whether the town will elect one, will not preclude the town from voting upon that question, and, therefore, will not invalidate an election effected at a meeting held under such warrant.

The age of a voter may be proved by the record of his birth inserted in the town records, coupled with evidence of his identity.

If it appears from the evidence, that the poll was closed before the close of the meeting, it may be inferred, in the absence of counter evidence, that it was legally closed by a vote of the town.

At the hearing of petitioners against a claim for a seat, the committee may consider objections not stated in such petition.

No member having been returned from the town, of Bellingham, James M. Freeman, who claimed to have received a majority of the votes cast therein for a representative at the annual

meeting, petitioned[1] the house on the 7th of January, 1846, that he might be admitted to a seat, and his petition was on the next day referred[2] to the committee on elections. Two counter petitions against this supposed election, couched in the same language, and signed, the one by Charles W. Tingley and twenty-five others, and the other by Nahum Cook and thirty others, were subsequently presented and referred[3] to the same committee, who, on the 27th of January, made their report,[4] which was ordered to be printed. The report sets forth the allegations of the parties, on the one side and on the other, as follows:—

"The petitioner claims a right to a seat on the following grounds:—

1. Because, at the election duly held on the 10th of November last, the poll having been opened and closed according to law, the votes were counted and declared as follows:—whole number 163, necessary for a choice 82, and that James M. Freeman had that number and was chosen. It was immediately suggested that a vote for James J. Fiske had been overlooked. Search was made, and in one of the piles such a vote was found, and without again counting all the votes, this was added to the 163, making 164, and it required 83 for a choice, and the selectmen directed the clerk to make up his record accordingly, making no choice.

2. That the meeting was adjourned to the next day, and after three unsuccessful ballotings the meeting was dissolved.

3. Because it has since been ascertained, that two illegal votes were thrown against James M. Freeman, to wit, by John Jackson, an unnaturalized foreigner, and Martin G. Cushman, a minor.

The petitioners against the election controvert the right of Freeman to a seat for the following reasons:—

1. Because the warrant calling the meeting at which said Freeman claims to have been chosen, stated no time when the polls would be open, as required by the act concerning elec-

[1] J. H. 5. [2] Same, 8. [3] Same, 50. [4] Same, 127.

tions, passed March 9th, 1839, and the proceedings under said warrant are, therefore, void.

2. Said Freeman had not a majority of the votes cast at the meeting.

3. The meeting was adjourned to the next day, and said Freeman was a candidate at the adjourned meeting, and thereby waived all claims to a choice on the first day, and cannot now go back to the first meeting.

At the hearing before the committee, other objections not stated in the counter petitions were offered against the petitioner's right to a seat. In the case of Erastus Richards, member from Sharon, whose election was controverted in 1843, (*ante*, 502,) it was determined that 'allegations not set forth in the petition, nor contained in specifications, came too late, and could not be considered.' The committee, however, in the case now before them, have been willing to consider any additional objections offered by the petitioners, among which are the following:—

1. That in the warrant for calling the meeting for the 10th of November, it was not stated, that the question would be put whether the town would send a representative.

2. That the town did not vote to close the poll, and it does not appear that the poll was closed, before the meeting was closed.

3. That Paul Chilson gave a vote for Nahum Cooke, which was not counted by the selectmen."

The committee then submitted a statement of the evidence in the case, from which it appeared, that the allegations of the parties were substantially proved thereby. The only portion of the evidence, which it seems necessary to state, is that of Stephen Lewett, one of the selectmen, which was as follows:

"I am one of the selectmen of Bellingham, and presided as chairman of the selectmen during the meeting of the 10th of November. No vote was passed by the meeting to send a representative. After the poll was closed, the votes were sorted; the town clerk stood at my side, and when they were sorting, the names of the candidates were given by me to the clerk. After the votes were sorted, the piles for the lower candidates were first taken, and the numbers given to the clerk; those smaller piles were then brushed aside to make room for counting the larger piles. I think I perfectly remember giving the name and number of the vote for J. J. Fiske; I have no

doubt as to giving both the name and number. After the smaller piles were brushed aside, and the larger counted, the numbers were given to the clerk, and he put them down, as I supposed. The clerk then added them up, and the whole number added was 163; James M. Freeman then had 82; the selectmen made the declaration of the result from Mr. Freeman's record, without reckoning it up themselves; the selectmen first announced the whole number of votes, and then the number necessary to a choice, and that James M. Freeman had the number necessary to a choice, 82. The selectmen then read to the meeting the number of votes the several candidates had, as a part of their declaration. When I had read to within one or two of Mr. Fiske's name, I discovered there were no figures set against his name. I then said to Mr. Holbrook, and perhaps to Mr. Thayer, the other selectmen—'You are sure there is a vote for Mr. Fiske?' Mr. Holbrook replied, 'Certainly there was; I can pick it up here,' turning directly to the corner of the table where the smaller piles had been brushed up. The vote for Mr. Fiske was then found in that pile of the scattering votes. Mr. Freeman was present at the time it was found. At my statement, Mr. Freeman carried out the number against Mr. Fiske's name, and altered the footing of the column to 164. After the mistake was corrected, I finished reading the statement of the votes for the several candidates. The declaration was then made that there was no choice. At the time of the correction, Mr. Freeman made no objection. A very few minutes were occupied in correcting the mistake."

The committee concluded their report as follows:—

"The first objection urged by the petitioners is, that, in the warrant for calling the meeting, no time was stated when the poll would be opened, as required by the act passed March 9th, 1839.

The second section of that act provides, that 'the warrant for notifying any such meeting shall specify the time or times when the poll for the choice of the several officers shall be opened.' By the 6th section of the same act, it is provided, that 'if any selectman, or any other town or city officer, shall wilfully neglect or refuse to perform any of the duties required of him by the third chapter of the Revised Statutes, or by the provisions of this act, he shall forfeit a sum not exceeding two hundred dollars.'

The committee find that in 1840, the next year after this act was passed, a construction was given by the house to the second section, so far as it relates to the choice of representatives, which has not been overruled by any subsequent decision. In the case of Silas Walker and Benjamin F. Keyes, members from West Boylston, (*ante* 394,) the report of a committee, which was agreed to by the house, is as follows:—'It is apparent that the warrant does not specify (otherwise than

by implication, if at all) the hour at which the poll should be opened. But there is no allegation or suspicion of fraud in this case, or of any injurious result arising from this omission, and it is not sufficient to vacate the seats of the sitting members.' The principle involved in this decision seems to be, that this section of the statute is to be considered as directory to town officers; that they incur the penalty prescribed in the 6th section for neglect of duty; but that such neglect, except in cases of fraud, ought not to deprive the town of its representation. Such having been the construction heretofore given to the second section of the statute, the committee do not now recommend that it should be changed or reversed. The only case which seems in the slightest degree to conflict with the foregoing decision, occurred in the year 1843, when the seat of Mr. Hannum, member from Easthampton, (*ante*, 471,) was vacated, 'because the poll was not kept open two hours, and also, that the warrant did not specify at what time the poll would be opened.' It was proved in that case, that the poll was not kept open two hours; and that fact, of itself, might, and probably did, furnish a sufficient reason for the decision that was then made. Unless the poll is kept open two hours, it can never be known that all the voters in the town have had an opportunity to exercise a right secured to them by the constitution and laws of the commonwealth.

In this connection, the committee would state, that the 8th and 10th sections of the 5th chapter of the Revised Statutes have been construed as directory to town officers. Those sections declare expressly, in what manner the selectmen and constables of towns shall give notice to persons who are chosen representatives. In the year 1845 the house decided, that where town officers had omitted to give any such notice whatever, it was a neglect of duty subjecting them to a penalty, but that such omission did not affect the validity of the election, or the correctness of the member's certificate. This decision, which is believed to be in accordance with former usage, has been confirmed by a similar decision, made during the present session.

Another objection stated in the petition is, that the meeting was adjourned to the next day, and that said Freeman, having been again a candidate, thereby waived all claims to a choice on the first day.

It appears from the town records, that the meeting was adjourned to the next day, that the vote passed on the first day not to send a representative was reconsidered, that three ballotings were had, that no choice was made, and that the meeting was then dissolved. But it appears to the committee, that no proceedings which took place on the second day can impair any rights, which the petitioner might have acquired on the first day. It appears that Freeman was again a candidate at the adjourned meeting, but that fact is wholly immaterial. No man can prevent people from voting for him for a public office, if they choose to do so; and he is sometimes surprised to find himself a candidate, without his knowledge or consent, and against his wishes.

Another objection is, that in the warrant for calling the meeting, it was not stated that the question would be put whether the town would send a representative.

The supreme judicial court, in compliance with an order of the house, passed June 13th, 1815, gave it as their opinion, that 'the right to send a representative is a corporate right vested in the towns by the constitution,' which right the town may exercise or not according to their discretion. A motion, therefore, not to send a representative is always in order after the meeting is opened; and it appears to the committee, that whenever such a motion is made, the town cannot be precluded from acting upon it, by any omission in the warrant to state that such a question would be put to the meeting. This view is sustained by the language used by the court in the opinion above referred to: 'When the town is legally assembled for the purpose of electing a representative, if a vote pass not to send one, the minority, dissenting from that vote, cannot legally proceed in the choice.'

Another objection made to the legality of the meeting is, that the town did not vote to close the poll, and it does not

appear that the poll was closed, before the meeting was closed.

It appears from the records, that the town proceeded to business, by the selectmen opening the poll at half past twelve o'clock, and that, at twenty minutes before three o'clock, the votes were counted for representative. Manning Thayer, one of the selectmen, testifies that the poll was kept open two hours. Stephen Lewett and Amos Holbrook, the other two selectmen, speak of the poll as having been closed, but do not say at what time. Lewett's testimony is, that 'after the poll was closed, the votes were sorted.' Holbrook states, that 'after the poll was closed, we sorted the votes.' It evidently appears, therefore, that the poll was closed before the meeting was closed; and, in the absence of all proof to the contrary, the committee think it fair to infer, that the poll was legally closed by a vote of the town.

Having considered the several objections, urged by the petitioners against the legality of the proceedings, at the meeting on the 10th of November, the committee come to the inquiry whether, from the facts in the case, James M. Freeman, the petitioner for a seat, was duly elected.

The committee are of opinion, that the vote for Fiske, having been found among the scattering votes, was not included in the pile of votes for Freeman, nor counted as one of the 82 received by him, as the counsel for the petitioners suggested it might have been. The selectmen, having found a vote for Fiske, soon after they declared Freeman elected, proceeded correctly in adding it to the number of scattering votes, and in making a second declaration. It was not then known to the selectmen, that any person had voted, who was not constitutionally qualified, and they clearly discharged their duty in withholding a certificate.

That John Jackson was not a citizen of the United States, is so clearly proved, that any comment is unnecessary. By a wise provision of the constitution of this commonwealth, none but citizens are allowed the right of suffrage.

The committee are of opinion, that Martin G. Cushman

was the identical person whose birth was recorded in the town records, November 16, 1824, and that being a minor on the 10th of November last, he was not constitutionally qualified to vote.

If, then, the votes given against Freeman by Jackson and Cushman be deducted, it will give the petitioner a majority. The whole number of votes would be 162; necessary for a choice, 82; which number Freeman received. The committee, being of opinion that he received a majority of the legal votes, deem it unnecessary to consider whether there is sufficient proof that a vote was cast for Nahum Cooke. No such vote having been found by the selectmen, the burden of proof is on the petitioners, and if they have failed to establish the fact beyond a reasonable doubt, the vote ought not to be counted. But, if the vote should be admitted, it would only increase the whole number to 163, of which 82, received by Freeman, would still be a majority.

The committee, therefore, unanimously recommend the adoption of the following resolution:—

Resolved; That James M. Freeman be admitted to a seat as a member of this house."

This report was considered and agreed to[1] on the 31st of January, and Mr. Freeman at once took his seat as a representative.

On the 10th of February it was ordered,[2] that Mr. Freeman, "in making up his account for attendance during the present session, be authorized to commence on the 12th of January, that being the day when he first appeared before the committee on elections."

[1] 68 J. H. 163. [2] Same, 227.

1847.

COMMITTEE ON ELECTIONS.

Messrs. *Thomas Tolman*, of Boston, *John S. Ladd*, of Cambridge, *Warren Lovering*, of Medway, *George S. Boutwell*, of Groton, *Otis P. Lord*, of Salem, *Hardin Hemenway*, of Shutesbury, *Hiram A. Beebe*, of Westfield.

DANA.

Under Stat. 1844, c. 78, the poll is to be considered as opened, when the ballot-box is presented to the voters, and they are called on to prepare their votes for a balloting.

It is improper to allow any one to vote after the ballot-box has been turned.

It is clearly contrary to the express provisions of law, to delay the public declaration of the result of a balloting, after the votes have been counted, and the result ascertained.

It seems, that a ballot deposited after the result of a balloting has been ascertained, though not declared by the presiding selectman, is not to be counted.

The election of Benjamin Richardson, the member returned from the town of Dana, was controverted by James S. Brown and fifty-five other voters of that town,[1] upon grounds stated in the following report[2] of the committee on elections, namely:—

"At the meeting in the town of Dana, on the ninth of November last, there were four ballotings for a representative. The first three were declared to have resulted in no choice. On the fourth, the selectmen declared the sitting member to be elected, and gave him a certificate of his election in the usual form. The certificate is signed by the three selectmen of the town, comprising the whole number, and contains a constable's return, that the person elected was duly notified.

The petitioners allege, that the proceedings on the fourth ballot were irregular and illegal, and that the supposed elec-

[1] 69 J. H. 34. [2] Same, 300.

tion of said Benjamin Richardson ought to be set aside and his seat vacated.

The sitting member avers, that he was, in fact, elected on the third ballot, notwithstanding the selectmen announced that there was no choice. But, if it should appear that he was not chosen on the third ballot, he contends that he was legally elected on the fourth.

A large number of witnesses have testified to facts relating to this election, but the committee have not considered it necessary to report the evidence in full. Such portions of it only will be presented, as justice to the parties, and a correct understanding of the case, seem to require.

If the sitting member, as he alleges, was lawfully chosen on the third trial, it is of little consequence, so far as he is concerned, whether any, and, if any, what irregularities might have taken place on the fourth. He acquired rights which it was not in the power of the selectmen, or the town itself, to take away from him. If another person had been declared to be elected on the fourth trial, had received the usual credentials, and had taken his seat in the house, that seat would be vacated on making the requisite proof of a prior and paramount right.

The committee will first consider the question, whether the sitting member was chosen on the third trial, and invite attention to the following evidence:—

Isaac Doane: 'I am one of the selectmen of Dana, and was present at the meeting on the 9th of November last. After voting on the third ballot for representative, the chairman said, that if there was no objection, he would turn the box. No objection was made, and he turned it. The votes were counted, and the result was that Benjamin Richardson had 70 votes, Mr. Stone 60, and there were 9 scattering. The town-clerk set them down and added them up. I asked the clerk why the chairman did not declare that Mr. Richardson was elected, but heard no reply. After the adding up, I stood a few minutes, and asked him again, I think, why the vote was not declared. I think it was fifteen minutes after the clerk had footed up before the vote was declared. We all saw what the result was. We all assisted in counting. Elias Woodward passed by, and, I suppose, put in a vote, and the declaration was then immediately made that there was no choice. To the best of my judgment the delay, between the time that the count was completed on the third ballot, and the declaration of the vote, was from ten to twenty minutes. It could not have been more than a minute, after Mr. Woodward passed, before the vote was declared. From fifteen to twenty minutes were occupied in counting before footing up. The town clerk counted

my pile of votes after me, and I counted his. It has been our custom to receive votes after the box was turned, and before the counting was completed and the declaration made.'

George G. Braham deposed, that 'near the close of the third balloting he took a seat near the selectmen. The box was turned soon after and the selectmen proceeded to sort and count the votes. One of the selectmen, Mr. Isaac Doane, sat down by me, and said Mr. Benjamin Richardson was chosen by a majority of one. There was some space of time, after counting the votes, when the selectmen appeared to be doing nothing. After a while, Elias Woodward came up with a vote and laid it on the desk, and immediately, perhaps one minute after, the chairman declared there was a tie and no choice. I recollect no person voting after the box was turned, but Woodward.'

Nathaniel L. Johnson deposed: 'I voted on the third ballot; went out of the hall, and returned. I had understood there was a choice in the election of Mr. Richardson. When I returned, I saw the selectmen in their places, apparently doing nothing. After waiting a few minutes, Elias Woodward came up and offered his vote, which was objected to by Jonathan E. Stone, one of the selectmen, for the reason that it was too late; but the vote was received, and almost immediately it was declared by the chairman that there was a tie and no choice.'

Albert Bosworth deposed: 'After the votes were given in, (on the third trial,) the chairman said, if there is no objection, I shall turn the box. The box was turned, and the votes counted. I stood near by, and heard it said, by the chairman, that Mr. Richardson was chosen by a majority of one. The votes were counted twice at least. Soon after, a Mr. Woodward came up with his vote and some one objected; but the vote was received, and then the selectmen declared that there was a tie, and no choice. The chairman said to the town clerk, that Mr. Richardson was chosen, not openly. It was not said in a whisper, but it was said so that I heard it distinctly. It was not said in a loud tone. I was about as near to him as the town clerk was. I stood by and counted the votes at the same time the selectmen did, and I know there was no counting of the votes after Woodward gave in his.'

There is more evidence of a similar purport. The law relating to this subject is contained in the fifth chapter of the Revised Statutes, section sixth: 'They (the selectmen) shall openly receive, sort, and count the votes (for representative) there given by the qualified voters present, and shall forthwith publicly declare who are the persons elected.'

A majority of the committee are of opinion, that the sitting member was fairly chosen on the third ballot. The votes had been counted, and it was known to the selectmen, town clerk, and to some other citizens of the town, that Mr. Richardson was elected by a majority of one vote. Ten minutes elapsed, if not more, after the result of the balloting was ascertained, before Mr. Woodward made his appearance and claimed his

right to vote. The majority of the committee believe, that the practice which prevails, in some towns, of allowing persons to vote after the box is turned, ought to be discontinued. But whatever may be the custom, as to receiving votes while the town officers are engaged in counting, it is clearly contrary to the express provisions of law to delay making a public declaration, after the counting is finished and the result ascertained. The statute requires that the declaration shall be made forthwith. The majority of the committee do not intend, in the present case, to impute any improper motives to the selectmen. They probably intended to discharge their duty faithfully, but acted, as we think, under misapprehension or mistake.

It is easy to see, that if the result of a balloting is not declared 'forthwith,' or immediately after all the votes are counted, an opportunity is given to the presiding officers, should they be so disposed, to exercise an influence inconsistent with the purity of elections. Suppose, for instance, that the candidate should be the political or personal friend of the selectmen, and it is ascertained, from counting, that only one or two votes are wanted to secure his election, it might sometimes be in their power, (as they know from the check list who have not voted, as well as those who have,) by sending messengers after absentees and postponing a declaration, to secure their object. Or, if a political opponent was found to be chosen by a very small majority, they might, by the same unfair management, defeat his election.

The committee have already stated, that the petitioners contest the right of the sitting member to his seat, in consequence of irregular proceedings, which, they allege, took place on the fourth trial. The first and principal objection is, 'that the poll was not opened before five o'clock in the afternoon.' The 78th chapter of the acts of the year 1844 is in these words:—'In all elections for representatives to the general court, when a choice is not made on the first ballot, other ballotings may be had on the same day: *provided*, that in no case shall the poll at such elections be opened after five o'clock in the afternoon, on said day.'

Those who are familiar with the history of our legislation for a few years past, know that this act was intended as a substitute for the celebrated sunset law of 1839. So much of the second section of that law, as relates to closing the poll before sunset, was expressly repealed March 24th, 1843, and the third section was rendered inoperative by the act of 1844. Some have argued, that the sunset law was unconstitutional, others, that it was merely directory to the selectmen. It has been said, that, as the constitution allows the whole day for the choice of a representative, it includes, of course, the time between sunset and twelve o'clock at night, and that the legislature does not possess the power to alter it. Those who considered that law as mandatory merely to the selectmen, admitted that it was a good regulation for the accommodation of aged and infirm voters, and for preventing riots and disturbances, in the night time; but contended, that where an election was effected after sunset without any fraud or unfairness, the seat of the person chosen ought not to be vacated, though the selectmen might be punished for its violation. The same objections that were made to the old law, requiring the poll to be closed by sunset, may be urged against the one now under consideration, which directs that the poll shall not be opened after five o'clock in the afternoon. The same constitutional principle is involved in both, and hence the decisions of the house, in cases which occurred under the old law, are applicable to this. It will be seen, that the house took a different view of the subject, insisting on a strict compliance with the law, notwithstanding all the objections urged against it. It was decided to be constitutional, and something more than directory to selectmen. In the year 1843, the seat of Abner Shedd, member from Burlington, (*ante*, 460,) was vacated for no other cause than that the poll was kept open after sunset. It was said by the committee, in that case, 'that the act of the town, in commencing a ballot after sunset, was a direct violation by the town of a law of the land; that, although a right to be represented is a high municipal privilege, and not to be taken away upon slight ground, still, a town violating the law has less claim to con-

sideration.' In the year 1844 the seats of the four members from Charlestown (*ante*, 518,) were vacated for the same reason, under the third section of the act, not repealed in 1843.

The facts in relation to the fourth ballot in the town of Dana, as proved by witnesses on both sides, are briefly these:—Immediately after the chairman had declared that there was a tie and no choice on the third ballot, he 'presented his box,' (in the language of a witness for the petitioners,) and said, 'prepare yourselves for another balloting.' James S. Brown, one of the petitioners, testified, that 'the chairman called on the voters to prepare their votes for a fourth ballot.' This was between four and five o'clock in the afternoon. The balloting, however, did not commence immediately after this call from the chairman. The selectmen spent some time in sealing up the returns for state officers. There was some excitement in the meeting, caused by the near approach of five o'clock. Considerable discussion took place about the legality of proceeding to another choice. The election law was read. A motion was made to dissolve the meeting, which was considered to be out of order, as the returns were not sealed up, which the law requires to be done in open town-meeting. Another motion was made to adjourn to the next day, which the chairman at first declared to be a vote, but, the vote being doubted, it was finally determined not to be a vote to adjourn. These proceedings occupied so much time, that it was clearly past five o'clock before the first vote, on the fourth balloting, was deposited in the box. The voting then proceeded, and Benjamin Richardson, the sitting member, received nearly all the votes given in, his opponents having either left the meeting, or declined voting, on the ground, that the doings were illegal.

If the poll cannot be considered as open until the selectmen begin to receive votes and check the list, and former precedents of decisions, under the law of 1839, which have been cited, are to govern, then the sitting member was not legally chosen on the fourth ballot. The committee, however, are inclined to give the statute a more liberal construction. They are of

opinion that the poll was opened, at the time when the chairman presented the box and called on the voters to prepare themselves with votes for another ballot. Every body was notified that another balloting was to be had. The depositing of the votes and checking the list were merely deferred for a short time, to accommodate the selectmen in sealing up the votes for state officers, and, while thus engaged, a discussion arose, which occasioned a delay until after five o'clock.

Another objection to the legality of the election, on the fourth ballot, alleged by the petitioners, is, that the meeting was fairly adjourned to the next day. On this point, much testimony was introduced by both parties. The committee, however, are satisfied, that although the chairman at first declared the meeting to be adjourned, and thereupon several voters left their places and proceeded towards the door, intending to leave the hall, and some near the door might have left it entirely, yet that the vote was seasonably doubted and the question put again, when the chairman declared that it was not a vote to adjourn. Several witnesses testified that the vote was immediately doubted; that the selectmen had not left their seats; that the house was divided and counted; and that the meeting refused to adjourn.

The minority of the committee are of opinion, that the sitting member was not chosen on the third ballot, but think that he was constitutionally elected on the fourth.

The committee, therefore, are unanimously of opinion that the sitting member was duly elected on the ninth of November last, and that he is entitled to a seat in this house; and they recommend that the petitioners have leave to withdraw their petition."

This report was submitted to the house on the 20th of February,[1] and ordered to be printed; and on the 27th of February it was agreed to.[2]

[1] 69 J. H. 300. [2] Same, 356.

CASE OF DAN HILL, PETITIONER.

Whether there can be a valid election of a representative without the agency of selectmen, *Quære.*

The act incorporating the town of Blackstone provided, that the town should remain for a certain period a part of the town of Mendon, for the purpose of electing a representative; that the warrants for calling meetings for the election of representatives should specify ten o'clock, A. M., as the hour at which the poll should be opened; and that the poll should be opened accordingly, and closed by one o'clock, P. M. It was held, that it was not necessary that the poll should be opened, but that the voters of the two towns might properly vote not to send a representative, and might thereupon dissolve a meeting called for the election of one.

A warrant for calling a meeting for the election of a representative specified 10 A. M. as the hour at which the meeting would be opened, and the weight of evidence was deemed to be, that the meeting was not opened before that time. After the meeting was called to order, a motion not to send a representative was made, on which the selectmen declared the vote to be a tie, but after a conference with the town clerk, who had also counted and found the vote to be against sending, put the question again, and declared the result to be a vote not to send. One who had voted in the minority then moved to reconsider this vote. Pending a discussion of his right to make the motion, a motion was made to dissolve the *warrant* and carried in the affirmative. This vote was doubted, but no notice was taken of the doubt; and the selectmen retired from the desk. A moderator was then chosen and an election had, of which the result was declared to be the choice of a representative, whose election was certified by the moderator, and by four persons who acted as his assistants. It was held, that such election was void.

A vote to dissolve the *warrant* (that being the usual motion in the town) is equivalent to a vote to dissolve the meeting.

THERE having been no return from the united towns of Mendon and Blackstone, Dan Hill caused his petition to be presented, praying that he might be admitted to a seat as a member, and this petition, with one of Newton Darling and 318 others, legal voters of Blackstone, in aid thereof, was referred[1] to the committee on elections, on the 11th of January. On the 6th of February that committee reported[2] as follows:

"In the year 1845, the town of Blackstone was set off from the town of Mendon. As the town of Mendon, at that time, was entitled to only one representative, it was provided, in the 6th and 7th sections of the 'act to incorporate the town of Blackstone,' as follows:—

'Sect. 6. The said town of Blackstone shall remain a part of the town of Mendon, for the purpose of electing the representative to the general court, to which the town

[1] 69 J. H. 25. [2] Same, 196.

of Mendon is entitled, until the next decennial census of the inhabitants shall be taken, in pursuance of the thirteenth article of the amendments of the constitution. And the meeting for the choice of such representative shall be called by the selectmen of Mendon; and the warrant shall specify ten o'clock in the forenoon, as the time when the poll at such election shall be opened; and the same shall be opened accordingly, and be closed by one o'clock in the afternoon of the same day.

'Sect. 7. The selectmen of Blackstone shall make a true list of persons belonging to said town, qualified to vote at every such election, and the same shall be taken and used by the selectmen of Mendon, for such election, in the same manner as if it had been prepared by themselves. Such meetings shall be held in the towns of Mendon and Blackstone, respectively, in alternate years, commencing with the town of Blackstone; and the selectmen of Mendon shall appoint such place for every meeting to be held in Blackstone, as the selectmen of Blackstone shall, in writing, request.'

It appears, that on the second Monday of November last, at a meeting of the qualified voters of the two towns, held in Mendon, in conformity to the requirements of the law above recited, there was one balloting for a representative; that the whole number of ballots was 288, and that no person received a majority of the votes. At this meeting the petitioner was not a candidate.

Another meeting was called to be held at the same place, on the fourth Monday of November last, for the choice of a representative. It is admitted by the petitioner, that the warrant was duly issued by the selectmen of Mendon, that the voters were legally notified and warned, that the warrant was properly served and returned, and that the meeting was regularly called. It appears from an inspection of the warrant, that the voters were called upon to assemble punctually at 10 o'clock in the forenoon.

The petitioner states, in his memorial;—'That at the hour appointed for said meeting, (on the fourth Monday of November,) and within a few minutes of the precise time mentioned in said warrant, a large number of the qualified voters of said towns assembled at the place designated in said warrant, for the purpose of giving in their votes to the said selectmen, for a representative:—that the said selectmen, though present at said meeting, refused to open the poll, and, disregarding their own duty, and the rights of the citizens and voters there assembled, retired from their seats and refused to preside in the meeting:—Whereupon, the meeting called upon Emory Scott,

Esquire, chairman of the selectmen of Blackstone, to preside in said meeting, and to receive, sort, and count the votes for a representative; that the said Emory Scott opened the poll, and called upon the legal voters present to bring in their votes for such representative, and, after allowing all of said voters a fair opportunity to bring in their votes, the said presiding officer, with the aid of respectable gentlemen, (who had also, at his request, aided him as inspectors during the balloting,) did in open town-meeting sort and count the votes which had been brought in, and found that the whole number of said votes amounted to two hundred and two; that of this number your memorialist had one hundred and thirty-seven, and that all other persons voted for had sixty-five; whereupon it appeared that your memorialist, having a large majority of all the votes cast, was chosen a representative from said town, and the meeting was then dissolved. Wherefore, your memorialist claims that he is entitled to a seat in this house, as a representative from the town of Mendon.'

This is a statement of the case as presented by the petitioner himself. He has delivered to the committee a certificate of his election, which is in the common form, excepting, that instead of the selectmen, it is signed by Emory Scott, *moderator*, and Washington Hunt, William Legg, and Aaron Burdon, *assistants*.

The committee have examined several witnesses, and the material portions of their evidence will be submitted as a part of this report. Before proceeding, however, to introduce testimony, a preliminary question is suggested, which will now be considered. Assuming as true all the facts set forth in the memorial, could the petitioner have been legally elected? He alleges that the selectmen left their seats, and refused to preside at the meeting. This leads us to inquire whether there can be, in any case, a valid election of a representative which dispenses entirely with the agency of the selectmen?

The constitution, chapter second, section first, article third, provides, that votes for governor shall be given in 'to the selectmen who shall preside at such meetings;—and it is also

provided, chapter first, section second, article second, in relation to the choice of senators, that 'the selectmen of the several towns shall preside at such meetings impartially; and shall receive the votes of all the inhabitants of such town, present and qualified to vote for senators, and shall sort and count them in open town-meeting.' There is no such constitutional provision in relation to the choice of representatives, but some legislative enactment was soon found to be necessary. The constitution went into operation in the year 1780. On the 20th of April, 1781, a law was passed which required selectmen to call town-meetings for the choice of representatives in the general court, and to preside at and regulate said meetings, to furnish the person elected with a cetificate of his election, and cause him to be notified by a constable. Such has been the law on this subject from that time to the present.

The law now in force is contained in the fifth chapter of the Revised Statutes. The fifth section provides, that all meetings for the election of representatives shall be notified by the selectmen. The sixth section is in these words:—'The selectmen shall preside in such meetings, and they shall have all the powers which are vested in moderators of town-meetings; they shall openly receive, sort, and count the votes there given by the qualified voters present, and shall forthwith publicly declare who are the persons elected.' The seventh section directs that the election shall be recorded in the town records. The eighth section makes it the duty of the selectmen, within three days, to cause the person chosen to be notified, and the ninth prescribes the form of a certificate to be given to him, which certificate is to be signed by them.

Some of these requirements have heretofore been decided by the house, to be mainly directory or mandatory to the selectmen, and not essential to the validity of an election. Such, for example, is the eighth section, requiring the representative to be notified of his election by a constable. A case of this description from South Reading has been so decided by the house,[1] since the commencement of the present session. A

[1] See Report on the Returns of Members for 1845, and note.

similar case occurred in the year 1837.[1] Official notice is required to be given to the member elect, for the purpose of securing his attendance at the opening of the session. But, if he takes his seat without having received such notice, no injury accrues, although the selectmen, for their neglect of duty, are liable to the penalties of the law. So, if the election should not be recorded in the town records, as required in the seventh section, such omission would not probably be deemed sufficient to invalidate an election, which could be proved, without the records, to have been fairly made. These two sections require duties to be performed after an election has been effected. But it is difficult to imagine how any election can be legal, unless the meeting is, first, regularly warned, and secondly, unless the selectmen, who are sworn officers, open the poll, and receive, sort, and count the votes.

The committee are not aware of any decision of the house, which seems in the slightest degree to conflict with the opinion here presented, unless it is the case of Firgus McLain, returned a member from the town of Hope, in the county of Lincoln, in the political year 1809–10.[2] It is stated in that case, that McLain's seat was controverted on the ground, that a moderator presided at his election instead of the selectmen, and that this fact was proved by depositions. The committee have not had access to the original papers in that case, except to the certificate of the member, which is in the usual form and signed by the selectmen, and contains a constable's return that he had given the requisite notice. The only information to be procured from the journal of that year is, that, on the 24th of February, 1810, the committee on elections reported, 'that the town of Hope is entitled to a representative, and therefore that Firgus McLain is entitled to a seat in this house.' The report was agreed to. It appears, from the fact of giving the certificate, that the selectmen recognized the meeting as conducted by their agency and under their official supervision. From the language used by the committee, as appears from the journal, there is some doubt on what ground

[1] Ante, 347. [2] Ante, 71.

they reported in favor of McLain. During that year, the seats of several members, from towns incorporated since the adoption of the constitution, were controverted because those towns did not respectively contain 150 ratable polls. That objection, as well as the choice of a moderator, might have been alleged by the petitioners, against the right of McLain to his seat. If such an objection was made and overruled, the language of the committee is intelligible; otherwise their report, or the substance of it, as stated in the journal, is absurd.

It may be said, that if no meeting is or can be legal without the agency of the selectmen, they have it in their power, by neglecting or refusing to perform their duty, to deprive a town of its constitutional right of representation. Admitting that such would be the result, let us inquire whether there is any serious danger to be apprehended, from any such flagrant abuse of power by selectmen. They are citizens called to the discharge of important public duties, usually selected for their intelligence, integrity and capacity for business, and sworn to the faithful discharge of their trusts; and, for wilful neglect of duty or misconduct in office, they are liable to the pains and penalties of the law. These safeguards, it is believed, have generally been considered sufficient to protect the rights of the people against any wanton abuse of power by selectmen. If, however, the penalties now provided by law, to be inflicted on town officers for neglect of duty, are insufficient, they ought to be increased.

Entertaining these views, the committee were inclined to the opinion, that, admitting as true all the facts set forth in the memorial, the petitioner was not legally chosen, and is not entitled to a seat as a member of this house. They felt unwilling, however, to dismiss the case without giving both parties a full hearing. The evidence offered by the petitioner will be understood by referring to the extract from his memorial already given. The testimony adduced by the selectmen, in their defence, is designed to show, that the meeting on the 24th of November was not opened before 10 o'clock in the forenoon, (the time appointed by law as before stated,) that after the

meeting was opened, a motion was made not to send a representative, that the motion prevailed, and that the meeting was dissolved."

The following is a part of the evidence for the petitioner:—

"The following paper in the original was delivered to the committee by the petitioner, and appears to be a record of the votes given in at the meeting at which he claims to have been elected.

'Arnold Taft,	4
William Wood,	1
Josiah Webster,	31
Sumner Ballou,	4
Samuel W. Doggett,	25
Dan Hill,	137
	½)202
	102

S. W. Doggett, 12 in one piece of paper.
Same, 19 in one piece of paper.

The above two pieces of paper were counted as two votes for Samuel W. Doggett.

The above is a true count of the votes at a meeting held at Harrison Hall, in Mendon, on Monday the twenty-third day of November, A. D. 1846, as counted by me, Emory Scott, Moderator. Attest, Washington Hunt, William Legg, Aaron Burden, Alexander H. Allen.'

Emory Scott testified as follows:—"I am the chairman of the selectmen of Blackstone, and was present at the opening of the town-meeting, in Mendon, on the 23d of November last; was invited by the selectmen of Mendon, to assist in entering the names of voters on the check list, and did so; had brought with me the list of the voters of Blackstone; there were 446 names on the check list of Blackstone. At the time of opening, there were some forty or fifty persons present. An inquiry was made of Leonard Taft, the chairman of the selectmen of Mendon, if the time of opening the meeting had arrived. The chairman asked some one for the time, and the reply was, that it was 10 o'clock and after. I asked James A. Baldwin if it was 10 o'clock; he replied that it was 10 and a little after, by his time; my impression is, that he said it was ten minutes after 10 o'clock. The chairman, Mr. Taft, called the meeting to order, and then read the warrant and the officer's return. A motion was then made by Mr. Samuel W. Doggett, not to send a representative to the general court. The chairman put the motion, and declared it a vote not to send a representative. Some one doubted the vote. The chairman then called on those in favor of not sending a representative to hold up their hands; then he called on those of a contrary opinion to express it in the same manner, and declared it was a tie. The town clerk disagreed, making a majority of one in favor of not sending. Some called on the chairman to untie it,—some, to try the vote again. He put the motion again, and declared it was a vote not to send. I then made a motion to reconsider that vote. C. C. P. Hastings objected to my right to make the motion, having voted in the minority. Immediately Mr. Doggett moved to dissolve the warrant. The chairman made no decision as to whether my motion was in order. I was within five feet of the chairman. He called on those in favor of dissolving the warrant to hold up their hands; then on those opposed; and then stated it was a vote, 28 to 24, to dissolve the warrant. No other

declaration was made. I immediately doubted the vote. Mr. Doggett called back a portion of the people who had started to go out, saying, there is more voting to be done. Most of them returned. In a minute after, Mr. Leland, one of the selectmen, who had been conversing with the chairman, turned to me and said, The doubt is too late; you ought to have made it before. I replied, that I could not have made the doubt before the declaration of the vote, and urged upon the selectmen, as well as I could, in the confusion, that some notice should be taken of the doubt. Mr. Leland again said, It is too late. I said to the chairman, that I expressed the doubt in season. He made no reply. While we were standing, Mr. Hill and a large number from Blackstone came in. Mr. Hill endeavored to get an opportunity to address the meeting. As far as I could understand, he was trying to ascertain the state of the meeting. Such was the confusion, that Mr. Hill spoke very loud in order to be heard. After two or three attempts he did succeed, and stated to the selectmen that the right of representation was a constitutional right; that the people had a right to vote, and were not in this way to be deprived of their rights. The selectmen were standing in their places. Mr. Hill demanded that the votes should be received, and very soon several stepped up and demanded that their votes should be received. The chairman, being in the desk, said there was no meeting. He afterwards left the desk. Mr. Hill made a motion to choose a chairman, proceed to the choice of a representative, and bring the case before the legislature. They proceeded to choose a chairman, and I was elected by hand vote. I remarked that I would preside as chairman or moderator, but not in my official capacity as a selectman of Blackstone, and took the chair. Messrs. Washington Hunt, Aaron Burdon, William Legg, of Blackstone, and Alexander W. Allen, of Mendon, were invited to act as assistants, to prevent illegal voting. I called on the inhabitants to bring in their votes for representative. The poll was kept open about an hour and a half. I made and signed a record of the result of the voting. The two pieces of paper therein mentioned were rolled up to the size of one vote, and in that way got in. This record was made up before leaving the desk. A vote was then taken to dissolve the meeting. Two meetings for the choice of representative were held last year; the first was warned to meet at 9—the poll to be opened at 10 o'clock, A. M.; the second was notified to meet at 10 o'clock. It has been our custom to delay opening our town-meetings till some time after the hour named in the warrant. It was a common remark, in respect to town-meetings, among the voters, that they would have an hour before opening. Messrs. Legg, Burdon, and Hunt, have represented the town of Mendon in the legislature. Mr. Allen has been selectman and town clerk.

I do not recollect whether my motion to reconsider the vote not to send a representative was seconded. It is customary with us to put motions that are not seconded. Mr. Hill exhibited a good deal of feeling, and spoke loudly and earnestly. He said whoever was chosen representative would hold his seat. I suppose over 300 voters were present. Some attempted to vote twice. I charged some with attempting it, and they admitted it. Some might have voted twice; I know of none that did so. A handful of votes was thrown at the hat, but did not fall into it. At another time, a handful was put on the top of the hat; but, they adhering together, were all taken out. Before the division of the town, a motion not to send a representative was frequently made at the opening of the meeting; but there was usually an article in the warrant touching that question. Since the year 1840, the representative has been taken alternately from the sections now called Mendon and Blackstone. Last year the selection was from Blackstone. No exceptions, as to the time of opening the meeting, were taken."

Joseph Wheelock testified as follows:—"I called at the store of Davenport & Aldrich, on the morning of the 4th Monday of November. When I left for the place of meeting, it was just five minutes before 10, A. M., by the clock in the store. Went with E. Lamb directly to the hall, a distance of eight or ten rods. As I was going up the steps, I heard some one say 'I doubt it.' The selectmen were in their seats. S. W. Doggett asked them by what authority they kept their seats, and requested them to leave; they soon after withdrew. I do not know whether the clock in the store was right. I formerly lived in Mendon, and the clock in the store was then considered as a standard for time. I heard no motion made after I entered the hall."

The following evidence was introduced on behalf of the selectmen of Mendon:—

COPY OF RECORD.

"*Mendon, November* 23, 1846.—At a legal meeting of the inhabitants of the towns of Mendon and Blackstone, qualified to vote in elections and in town affairs, held this day at Harrison Hall in said Mendon, agreeably to the foregoing warrant, the following votes were passed, to wit:—

Voted, not to choose a representative to represent the towns of Mendon and Blackstone in the general court to be held at Boston on the first Wednesday in January next.

Voted to dissolve the warrant. Attest, Putnam W. Taft, Town Clerk. A true copy of record: Attest, Putnam W. Taft, Town Clerk of Mendon."

Putnam W. Taft testified as follows:—"I am town clerk of Mendon; was at town-meeting in Mendon on 23d November last. A motion not to send a representative was made immediately after reading the warrant. The vote was taken; a doubt was raised. A count was then made by the selectmen, who made it a tie; I also counted and made a majority of one in the affirmative. The vote was again taken and decided, by a majority of one or two, not to send a representative. A motion was then made to reconsider this vote, not to send, by Mr. Emory Scott, and, before the vote to reconsider was taken, a motion to dissolve was made and carried. The vote to dissolve was carried by 28 to 24. The meeting was called to order at ten minutes past 10, A. M., by my watch. I should think not far from twenty minutes elapsed between the opening and the dissolution of the meeting. I suppose my watch indicated the true time; am positive it was between five and ten minutes past 10 o'clock; have sometimes altered my watch; having let it run down, I set it that morning by the clock."

Stephen Taft testified as follows:—"I have held different town offices in Mendon, for about nine years; have been selectman three years, and attended every town-meeting for nine years except one. The representative has been taken from the two parishes, now forming Blackstone and Mendon, alternately. It was understood that the selection this year was to be from Mendon. I arrived before the meeting on the 23d of November was opened. The warrant was read, and no objection was made to opening the meeting. Soon after the warrant was read, a motion was made by Mr. Doggett, and seconded by myself and several others, 'that we vote not to choose a representative.' This motion was put by the chairman, and declared to be a vote; a doubt was expressed, and the chairman called on those in favor of not choosing a representative, to hold up their hands till counted; then on those opposed by the same sign. The chairman declared he made it a tie, but said, 'we disagree.' Some said, 'if you have not voted, untie the vote;' others requested him to try the vote again. He accord-

ingly put the motion again, and counted as before, and declared it was a vote, not to send a representative; think he declared the affirmative and negative. Mr. Scott then moved to reconsider it; did not hear his motion seconded. C. C. P. Hastings inquired if he voted in the negative or affirmative. Mr. S. replied, in the negative. Mr. H. then questioned his right to move a reconsideration. Pending this, a motion was made to dissolve the meeting or warrant. Mr. Scott insisted on his motion being tried. Some remarked, that a motion to dissolve took precedence of all others. I remarked to the chairman, that if the motion to dissolve was put, it would in effect try the sense of the meeting on Mr. Scott's motion. The motion to dissolve was then put, and decided by a count both of the affirmative and negative, and it was declared to be a vote to dissolve. The meeting up to this time was as orderly as usual. Mr. Scott very soon said, 'I doubt the vote;' said it two or three times quite low and not very distinctly; but I was near and heard him. Mr. S. was in the desk. It did not appear to me that he addressed the selectmen. I said to him, 'the affirmative and negative have been tried, and you may doubt all day.' Heard no other person express a doubt. I have no means of ascertaining the time of opening the meeting. The time, intervening between the reading of the warrant and the dissolution, could not have been much less than half an hour, or from 20 to 30 minutes. The votes were passed as deliberately as is usual in town-meetings. I saw Mr. Hill in the hall before the selectmen left the desk; a number came in at the same time. Mr. Hill appeared considerably excited, and inquired the state of business in the meeting. There was considerable noise; several were speaking. Mr. H. went to the desk and demanded his right to vote; others demanded that the poll should be opened. The selectmen remarked that the meeting was dissolved, and they had no right to receive votes, and soon left the desk. Mr. Scott was nominated as chairman of the meeting. The motion was put and declared to be a vote. Mr. S. said he would preside, as he has stated in his testimony. The assistants entered the desk with him. He then called for votes for representative. Some were disorderly; no order was requested. Before the close, the meeting became as orderly as could be expected. I saw votes thrown at the cap; saw none fall into it. I saw two persons go up deliberately and vote twice, and am of opinion there was considerable illegal voting. The poll was kept open an hour or an hour and a half, as long as any votes were offered. At the opening of the meeting, I looked around to see the probable number, and there must have been 100 voters present. Should think from 300 to 400 were there that day. The opening of our common town-meetings has been usually past the time appointed by fifteen minutes, half an hour, or an hour. At election meetings, it has been different; these have generally been opened as near the time appointed as possible. In one half of the meetings holden for the election of representative, a motion has been made at the opening not to send. At the meeting at which Mr. Scott presided, I heard the right of no one to vote doubted, no check list was used, a great many did not vote.

I should judge there were more present at the time the meeting was declared to be dissolved by the selectmen than at the opening."

William H. Aldrich testified:—"I am clerk in the store for Davenport & Aldrich. On the 23d of November last, Putnam W. Taft, the town clerk, was in the store, and he left the store five minutes past 10, A. M., by the clock in the store. Knowing him to be town clerk, and that the meeting was called at 10 o'clock, I thought it was time that he should be at the meeting, and this was the reason why I noticed the clock. We mean to keep the clock right, on account of the arrival and departure of the mails, and I believe it was right. I am assistant postmaster. The post office is kept in the store."

Several other witnesses were examined, but as their testimony does not differ, in any material respect, from that which is given above, it is not thought necessary to insert it. The committee further report as follows:—

"The petitioner was heard before the committee by his counsel, Charles T. Russell, Esq., who claimed for his client a right to a seat on the following grounds:—

'The meeting was legal at which he was elected. The constitution provides that a representative shall be chosen by written votes. This was done, and the petitioner had a large majority of those votes.

But it is said, the meeting had previously voted not to send a representative, and voted to dissolve itself. This the petitioner denies:—

1. Because, by the act incorporating Blackstone, it was not competent for the voters of either or both towns to vote not to send a representative, and to dissolve the meeting, without opening the poll. Act of 1845, c. 201, § 6.

2. Because, there being no article in the warrant to see if the towns would vote to send, and thus no intimation given to the people that such a vote would be put, but the warrant being simply to give in their votes for a representative, it was not competent for the meeting to act on the subject of sending or not sending. Rev. Stats. c. 15, § 21.

3. Because the only vote pretended to have been passed was "to dissolve the warrant," and not the meeting.

4. Because, in point of fact, no vote was ever legally passed to dissolve the meeting.

And upon this fourth point the petitioner insists that no such vote was passed:—

1. Because, if passed at all, it was before ten o'clock, the hour at which the meeting was called; or was predicated upon other votes, which had no legal effect, because passed before that hour.

2. Because, if such vote was passed, it was upon the assumption that a previous vote not to send had passed, which had never legally passed.

On the trial of this question the selectmen all counted and declared it "a tie," and as no one doubted the vote, they had no right to put it again; still, at the cry of some of the voters "to try it again," they did so, and declared it a vote. Whereas, the petitioner insists that the first vote, being ascertained by a count and declared, and not doubted, was conclusive.

3. Because, the moment such vote to dissolve was declared by the selectmen, Mr. Scott rose in his place and doubted the same, and the selectmen, hearing said doubt, refused to make the vote certain; and because, had they proceeded to make it certain, it would have been decided a clear and large vote not to dissolve the meeting.

But it is said the election is void:—

1. Because the selectmen did not preside. But if the meeting was not dissolved, then this was a palpable neglect of duty by them, and cannot disfranchise the town. Is the servant greater than his master? Can this great constitutional right be taken from 700 or 800 voters by the mere neglect of these officers?

The only requisitions of the constitution are as to the day of the meeting and written votes. All the other provisions are those of the Revised Statutes, and are mandatory upon the selectmen; but a non-compliance with them does not defeat an election and disfranchise a town.

That the fact, that the selectmen did not preside, does not vitiate the election, was settled in the case of the town of Hope.[1] See also the case of Chelsea.[2]

But it is said, that the check list was not used. But this does not invalidate an election, where the non-user of it is the act of the selectmen, or officers, and not by vote of the town. Westborough.[3]

But it is said, there is no certificate, record, &c. This will not invalidate where there has really been an election. Whately (1843);[4] Holland.[5]

Only two illegal votes are shown to have been thrown; deduct these, and Mr. Hill still has seventy majority.

[1] Ante, 71. [2] Ante, 474. [3] Ante, 392. [4] Ante, 439. [5] Ante, 366.

The petitioner stands here vindicating a great constitutional right, and the legislature will give that right force and efficiency, and carry out the well-expressed voice of the people, where they can. They will not seek to crush this right by the very forms intended to preserve it.'

The committee have felt disposed to furnish the petitioner with every facility in their power to make a full and fair statement of his case; and, for that purpose, have presented, in a condensed form, the ingenious argument of his counsel. The committee, however, do not think it necessary to reply in detail to the several points in the case made by the petitioner's counsel. A few comments only will be made.

The committee are of opinion, that the act of 1845, incorporating the town of Blackstone, was not intended to impair or restrict any right, which, before the passage of the act, was enjoyed by the town of Mendon; and, therefore, that the united towns may lawfully vote, if they please, not to send a representative. It has been often decided by the house, that a town, without any article in the warrant for that purpose, may legally vote not to elect a representative.

The case of Firgus McLain, from the town of Hope, has already been considered. That part of the Chelsea case referred to is taken from the majority report of the committee, which was not agreed to. The minority report was substituted by the house for that of the majority.

The committee, having presented a full report of the evidence, think that comment is unnecessary. There is a little discrepancy in the testimony, but it appears that the meeting was not opened before 10 o'clock, and that it was quiet and orderly until it was dissolved.

The committee unanimously recommend, that the petitioner have leave to withdraw his petition."

The foregoing report was ordered to be printed,[1] and, on the 20th of February was read and agreed to.[2]

A motion, that pay should be allowed to Mr. Hill, from the day on which his petition was presented, to that on which the

[1] 69 J. H. 196. [2] Same, 304.

committee made their report, was made[1] on the 5th of March, postponed to the next day, and then[2] rejected.

[1] 69 J. H. 399. [2] Same, 406.

1848.

COMMITTEE ON ELECTIONS.

Messrs. *Francis Hilliard*,[1] of Roxbury, *James Rider*, of Dartmouth, *Whiting Griswold*, of Greenfield, *Nathaniel W. Coffin*, of Boston, *Simeon Lamb*, of Charlton, *Richard A. Palmer*, of New Bedford, *Henry A. Pierce*, of Windsor.

PETERSHAM.

R. was an inhabitant of the town of P. on the twentieth day of April, 1847. He, then being the lessee of a public house in the city of B., and liable for the rent thereof, and finding that his sub-lessee had not paid the rent, went to B. and proceeded to keep the said public house, placing his sign upon its front, and having the principal part of his family with him, but at all times preserving the intention to dispose of his lease, upon the occurrence of a good opportunity to do so, and returning to P. While keeping the house as aforesaid, he was chosen a representative of the town of P. It was held, that he was an inhabitant of P. and his election valid.

The election of Lyman Robinson, the member returned from the town of Petersham, was controverted by Josiah White and others, on the ground that said Robinson was not, at the time of his alleged election, an inhabitant of that town. And the petition specifically alleges, "that the said Robinson, during the month of April, and previous to the first day of

[1] On the 28th of January, Mr. *Hilliard* was excused, at his own request, from service as a member of the committee, and *Charles R. Train*, Esq., of Framingham, was appointed in his place. 70 J. H. 144.

May, A. D. 1847, removed from said Petersham to the city of Boston, with his family, and ever since has been and is now an inhabitant of said Boston, dwelling in said city with his family, writing his sign and pursuing the avocation of an innkeeper in Ann street, in said Boston."

Other grounds of objection set forth in the petition were abandoned at the hearing.

It was admitted by the petitioners, that Mr. Robinson was a citizen of Petersham, and eligible as a representative, on the twentieth day of April, 1847. It then appeared, from the evidence on both sides, that he held a lease of a public house in Boston, for which the person to whom he had underlet it had failed to pay the rent. Upon learning of this failure, he immediately went to Boston to attend to the matter. Upon his arrival (in the latter part of April) he found it for his interest to purchase the furniture of the house from his sub-lessee, and to proceed to keep the house himself. He made an unsuccessful effort to dispose of his lease, then placed his sign over the door of the house, and sent for his wife, who joined him in Boston, and aided him in arranging and subsequently in keeping the house. His daughters afterwards went to Boston, at different times, and his son, with his wife, who had made a part of his family for several years, remained in Petersham in charge of his house and farm there. During the whole of the period in question, he frequently spoke of his intention to sell his lease of the public house, if he could get a good opportunity. In the month of June, he declared himself a citizen of Petersham, in a letter to his son, and was proved also to have spoken of that town, as the place of his residence, in the months of September and October. On the seventeenth of November, he claimed an abatement of his poll-tax in Boston, on the ground, that he resided in Petersham, and exhibited his tax bill from the treasurer of that town. He did not object to a tax for five hundred dollars, personal property, assessed upon him in Boston, as he kept the public house in question there. He was chosen a selectman of Petersham in March, 1847, and highway surveyor in April; in August he acted as such

surveyor, and signed as selectman an order upon the treasurer of the town for the payment of certain money, which was duly paid, and he voted there at the election in November.

The committee, after giving the evidence in full as a part of their report, conclude as follows:—

"It will be perceived, that the only question submitted to the committee was of the domicil of the sitting member.

Upon this question, the committee are unanimous in the opinion, upon a careful consideration of the whole evidence, that the absence of Mr. Robinson from Petersham was for a temporary purpose only, with no intention of changing his domicil or relinquishing his rights as an inhabitant of Petersham. The committee, therefore, recommend that the petitioners have leave to withdraw."

The petition was presented on the 15th of January.[1] The report was submitted on the 12th[2] and accepted on the 22d[3] of February.

WILLIAMSTOWN.

The election of Daniel N. Dewey, the member returned from Williamstown, was controverted by William Waterman and seven others, on the ground that twenty-seven persons were permitted to vote at the election, who were not inhabitants of the town, twenty-five of whom voted for the sitting member, and that Elias V. B. Concklin received a majority of the legal votes given at the election.

The petition was presented and referred to the committee on elections[4] on the 13th of January. On the sixth of March, the committee reported, that they had considered the subject of the petition, and that with the consent of the petitioners, they reported that they should have leave to withdraw their petition. And this report was at once read and agreed to.[5]

No evidence is on file with the papers in the case.

[1] 70 J. H. 61. [2] Same, 260. [3] Same, 332. [4] Same, 41. [5] Same, 509.

1849.

COMMITTEE ON ELECTIONS.

Messrs. *Henry W. Kinsman*, of Newburyport, *Nathaniel W. Coffin*, of Boston, *Asa H. Waters*, of Millbury, *John H. Richardson*, of Watertown, *Laban Marcy*, of Greenwich, *Henry Bourne*, of Sandwich, *Obadiah W. Albee*, of Marlborough.

WEST CAMBRIDGE.

A person, not legally elected a representative, though holding a certificate of his election, and having a seat in the house under the same, has no power to resign his seat.

The election of Mansur W. Marsh, returned from the town of West Cambridge, was controverted[1] by J. M. Whitten and others, on the ground that he had not received a majority of the votes at the balloting under which he claimed his seat. After the petition against his election was referred to the committee on elections, Mr. Marsh transmitted to the house a letter[2] resigning his seat, which letter was referred to the same committee, who subsequently reported[3]:—

"That, under the authority conferred upon them by the house, the committee summoned Moses Proctor, the town clerk, and the selectmen of the town of West Cambridge, to appear before them, on behalf of the petitioners, and also such witnesses as were desired by the said Mansur W. Marsh.

The town clerk produced and verified his record of the proceedings of the meeting of said town, for the choice of state officers; from which it appears, that on the 13th day of No-

[1] 71 J. H. 16. [2] Same, 43. [3] Same, 223.

vember, 1848, the town voted to send a representative to the general court; and, thereupon, proceeded to a vote, the result of which was as follows:—Whole number of votes, 300; for Mansur W. Marsh, 150; for Albert Winn, 133; for S. Fessenden, 15; for James Russell, 1; for James Clark, 1. The said Marsh, as chairman of the selectmen, presided at the meeting, declared the vote, and added these words, 'consequently no choice.'

The town subsequently voted to adjourn to the next day at 2 o'clock. The meeting on the next day was holden accordingly, Mr. Marsh still presiding; and a ballot was gone into, which resulted in no choice. The town then voted not to send a representative, and adjourned.

The testimony of the selectmen confirmed that of the town clerk, as to the proceedings of the meeting, and the accuracy of the record.

It further appeared, that Mr. Marsh subsequently called on Mr. Dixon, one of the selectmen, for a certificate of his election. The certificate presented to the house was signed by Mr. Marsh himself, and Mr. Dixon, they constituting a majority of the board of selectmen, Mr. Winn, the third, refusing to sign it.

Mr. Marsh requested the committee to hear testimony to be offered on his behalf; that the statement of votes in the town clerk's record was not correct; and that there were illegal votes cast against him at said election; which, if rejected, as he contended they should have been, he, Mr. Marsh, would have been elected by a majority of the legal voters of the town.

The committee, being desirous to ascertain all the facts, and feeling authorized, by the numerous precedents of similar proceedings heretofore established, informed both parties that they could have the opportunity of going into the question of illegal voting, and adjourned for a further hearing; the parties having, in the mean time, been informed that the committee would furnish them with the facilities authorized by the house for procuring the attendance of witnesses; of this privilege, Mr. Marsh availed himself.

At the adjourned hearing, Mr. Marsh was not present,

although duly notified of the time and place of the hearing; several witnesses were examined on both sides, with a view to show, that there had been illegal voting at said election; but their testimony was so conflicting and contradictory, that it had little weight with the committee. Upon a view of all the facts, the committee are unanimously of opinion, that there was no sufficient evidence submitted to them, to invalidate the town clerk's record of the proceedings of said meetings, and they therefore report, that the said Mansur W. Marsh is not entitled to a seat in this house.

Upon the other subject committed to them, the letter of Mr. Marsh resigning his seat, the committee report, that the said Marsh, not having been elected to a seat in this house, has no power to resign the same, and that he have leave to withdraw his letter of resignation."

The above report was ordered to be printed, upon its presentation, and two days afterwards was agreed to.[1]

SOMERSET.

A vote for a candidate who is constitutionally ineligible is not to be counted.

Upon a question of fact, arising at an election, which the selectmen, in the course of their duty, as presiding officers, are bound to determine, their decision is presumed to have been right, until the contrary is clearly proved.

Where it clearly appears, that a voter deposited a vote for one person, by mistake, intending to vote, and supposing that he did vote, for another, it seems that his vote is not to be counted.

It is the duty of every town to provide itself with proper ballot-boxes.

The petition of William W. Moore and others, against the election of the member returned from the town of Somerset, was presented[2] to the house on the 4th of January, and was referred[3] the next day to the committee on elections. On the thirtieth of March the committee reported[4] as follows:—

"The petition contains four objections to Mr. Slade's election:—

1st. That the name of Nathaniel Morton was borne on one

[1] 71 J. H. 236. [2] Same, 10. [3] Same, 16. [4] Same, 537.

of the ballots for representative, cast by a legal voter of Somerset, which was disregarded by the selectmen, and not included in the whole number of votes declared by the selectmen on that occasion.

2d. That, in the election, John Pike, a person not legally qualified as a voter, put into the box a ballot for Slade, which was counted and included, by the selectmen, in the ninety-four votes for Slade.

3d. That Robert Gibbs, or some other person, during the election, put into the box two ballots, each having thereon the name of Slade, which ballots were counted by the selectmen, and included in the ninety-four votes for Slade.

Finally. That Slade did not receive a majority of the votes legally cast in the election by the qualified voters therein.

The committee, before considering these allegations, feel it to be their duty to state to the house, that, although the proceedings of the meeting were not so far irregular as to make it proper, on that account, to set aside the election, yet, the proceedings were very disorderly; that the election being for state officers and member of congress, the votes were received into three hats, a practice, in itself very reprehensible, inasmuch as every town ought to be provided with suitable ballot-boxes; that great confusion prevailed in the meeting; that the bystanders crowded in a disorderly manner around the desk where the votes were received; and that it was proved, in two instances, at least, that persons, not town officers, presumed to meddle with the hats, and to touch the ballots, before the vote was finally declared.

Such practices the committee conceive to be very unbecoming and disreputable, and deserving the rebuke of this house.

At the hearing of the case, the town records were produced, by which the following appeared to be the statement of votes, at the election on the 13th day of November last, for town representative, viz.:—Whole number of votes, 186; for Jona. Slade, 2d, 94; John A. Burgess, 86; Benjamin Cartwright, 2; Daniel Chase, 3; Geo. S. Hood, 1.

It also appeared, by the testimony in the case, that there

was found in the hat, with the votes for town representative, one printed piece of paper, bearing on it the following words: 'For representative to congress, Nathl. Morton, of Taunton,' which piece of paper the selectmen disregarded and rejected, and did not count as a ballot, in reckoning up the whole number of votes. As to this vote, it was testified to by two witnesses, that it was put into the hat by Jona. Buffington, Jr., a qualified voter. The witnesses, Charles W. Moore, and John W. Marble, swore that they saw the vote in Buffington's hand, saw him put it into the hat, and saw it afterwards in the hat.

The said Jona. Buffington was also produced before the committee, and swore that a Mr. Bowers called on him, at the place where he was, two miles from the place of voting, and requested him to go to town-meeting and vote for representative; that he gave him a vote for Jona. Slade, 2d, as he supposed, which he put into the box pointed out by the selectmen; but he said he did not look at the vote, and did not see what name was on it; that he intended to vote for Mr. Slade, and didn't know that he did not vote for him. Other testimony was introduced, to show that Mr. Bowers, who went after Buffington, was a friend of Slade's, and procured the attendance of Buffington, to vote for Slade.

The committee, on this evidence, were of opinion, that said piece of paper, so found in the hat, with the name of Nathl. Morton upon it, was rightly rejected by the selectmen, for these reasons:—

1st. Because it clearly appeared, that said vote was cast by the said Buffington, by mistake, he fully intending to vote, not for Morton, but for Slade, and believing that he had done so.

2d. Because the vote was for a person not eligible for the office balloted for, as appeared by inspection of the vote itself.

The committee believe this question to have been settled by the decision of the house, in the case of the town of Whately,[1] in 1843; but, as that decision is, perhaps, of doubtful authority, having been made at a time of much party excitement, and, as

[1] Ante, 439.

it seems desirable that a question so important should be finally settled, they venture to suggest a few reasons in favor of rejecting votes given for ineligible candidates, at elections for representatives.

In the first place. It is to be presumed that such votes are cast by mistake, as whenever the names of the persons giving such votes have been ascertained, it has generally been found that their votes were cast inadvertently.

Again. The policy of the law requires, that such a construction should be put upon all proceedings at elections, as to make such proceedings valid, rather than nugatory. An election is always attended with trouble, inconvenience, and expense, and should not be set aside for light or frivolous causes. If votes cast by mistake, for persons not eligible, are to be counted, then the intention and will of the voter is defeated; if, on the other hand, such votes are wilfully put into the ballot-box, the person who thus votes indicates so clearly his disregard of the value of the elective franchise, that it is only a deserved punishment for his delinquency, to deprive his vote of all weight and influence at such election. By so doing, a voter is not deprived of any legitimate exercise of his right, because he can always manifest his opposition to any one candidate, by voting for some other.[1]

Finally, it seems to the committee, that there is no reason why a person, who votes for an ineligible candidate, should not be put upon the same footing with one who does not vote at all, as, in both cases, the parties show a disposition to prevent an election, and both of them show an unwillingness to perform their duty by aiding to promote those elections, which are absolutely essential to the existence of the government. For, if every voter refrained wholly from voting, or voted for an ineligible candidate, the result would be the same—no choice; and, although it is true that no penalty is attached, by law, to a neglect of this obligation of voting, yet the obligation is not the less plain for that, and the committee believe it

[1] In the case of *The King* v. *Monday*, Cowper, 537, Lord Mansfield said, that the only way of voting against one candidate was to vote for another.

to be a duty too important to be neglected, and too sacred to be trifled with, by voting for fictitious persons, or ineligible candidates. It may be urged, that, since the Revised Statutes provide, that blank pieces of paper shall not be counted as votes, the absence of any provision, to reject votes for ineligible candidates, is a strong argument that the legislature did not intend that they should be so rejected; the committee, however, believe, that it was not, at that time, contemplated, that any provision could be necessary, it being supposed that the practice of rejecting such votes by the legislature was so uniform, as to have taken the place of a law. Otherwise, it is difficult to see, why the same section was not made to comprehend both cases.

The voter, who puts into the ballot-box a blank piece of paper, as clearly indicates his opposition to all the candidates, as he who puts in a vote for an ineligible candidate; and there seems to be no reason, why the opinion of the one should not be entitled to consideration as well as that of the other.

As to the second allegation contained in the petition, that the vote of John Pike should have been rejected by the selectmen, at the election, it was proved to the satisfaction of the committee, that Pike was not qualified to vote at the election, he not having paid any tax assessed upon him within two years of the time of said election. It was also proved, that Pike voted for Jonathan Slade, 2d. They therefore are of opinion, that the vote of Pike should have been rejected by the selectmen, and that the same should not have been reckoned among the whole number of votes given in at the election.

As to the third allegation, that Robert Gibbs, or some other person, during said election, put into the ballot-box two ballots, having each thereon the name of said Slade, the committee find, that the history of the occurrence, out of which this allegation originated, is, in substance, as follows:—the votes for representative were received in a hat; from thence for the purpose of counting them, they were turned out upon the table. One of the selectmen assorted them, laid them in a pile by the side of the presiding officer, who took them up, read off

the names, and then returned each vote to the hat; in the mean time the town clerk kept tally. While the counting was going on, a bystander touched two votes which adhered together, and turned them on the rim of the hat, at the same time, exclaiming, 'Here are two votes which you have counted only as one.' The presiding officer thereupon took the two votes, which were both for Jonathan Slade, 2d, and laid them aside, at the same time remarking, that he would let them lie there until they had finished the count, as perhaps there might be a choice without recounting.

There was no choice, however, without enumerating both these votes, and the selectmen proceeded to recount, when the result, with these two votes included, was as above stated. On the part of the petitioners, it was urged, that these two votes must have been put into the hat accidentally, or otherwise, by one and the same person, because, as they said, it was almost impossible, that two votes should have got together, and coincided exactly, as was sworn to be the fact, unless they had been originally deposited by the same person. It was testified, on the other side, by the selectman who counted the votes, that these votes were on printed paper, 'a little dampish,' and that he 'laid them snug together in a pile.'

The committee had some difficulty in determining this question, but they finally concluded, that, inasmuch as said votes were not folded or fastened together, it was not impossible that they might have got together, while they were thus assorted and piled up, and adhered together afterwards, and that they were bound to presume, that said votes were deposited in the hat by two different persons. Furthermore, the committee felt bound to confirm the decision of the selectmen, in this matter, there being no direct testimony to impeach that decision. These officers, having been intrusted with the duty of presiding at the election, are to be presumed to have acted fairly and honestly, in the performance of that duty, until the contrary is shown. With both these votes, and all the facts before them, they decided, that what was denominated a double vote was, in fact, two distinct ballots. In the absence, then,

of any direct testimony, such as would be that of the person who put the votes in, or of some person who actually saw them put in, the committee do not feel justified in reversing that decision. Their opinion is, therefore, that the petitioners have failed to prove the allegation, that two votes were cast at said election by one person.

It follows from the above, that the final allegation contained in the petition, that Slade did not receive a majority of the votes legally cast in said election by the qualified voters therein, is not, in the opinion of the committee, sustained.

Correcting the statement of votes, agreeably to the above conclusions, and rejecting the vote of said Pike, the return would be as follows:—Whole number of votes, 185; for Jonathan Slade, 2d, 93; all others, 92; necessary to a choice, 93; and Jonathan Slade, 2d, having that number, was chosen.

The committee, therefore, report, that Jonathan Slade, 2d, was duly chosen a member of this house from the town of Somerset, at the meeting above referred to, and that the petitioners have leave to withdraw."

This report was printed by order of the house, and on the tenth of April was agreed to.[1]

[1] 71 J. H. 597.

1850.

COMMITTEE ON ELECTIONS.

Messrs. *James Dinsmoor*, of Lowell, *Samuel E. Guild*, of Boston, *Asa H. Waters*, of Millbury, *Charles Marsh*, of Adams, *Charles B. Hall*, of Haverhill, *Joseph P. Johnson*, of Provincetown, *Azariah Shove*, of Fall River.

ASHFIELD.

The reception of illegal votes, sufficient in number to change or prevent a majority, is not sufficient to invalidate an election, unless it also appears that such votes were for the person elected.

It seems, that a ballot, having the same name twice written upon it, is to be counted as one vote.

THE election of Hosea Blake, returned a member from the town of Ashfield, was controverted by Kimball Howes and seventy-seven others, legal voters of that town, on the ground, that four persons, namely, Ebenezer Putney, Thomas Dixon, Jr., William McLanathan, and James Hoyt, who were not duly qualified, voted at the election on the fourth Monday of November for the sitting member, who was declared to be elected by 148 votes out of 295. The votes were, for Hosea Blake, 148; Samuel W. Hall, 106; Anson Bement, 37; Kimball Howes, 1; for three other persons, each, 1. The name of Samuel W. Hall was written twice on one of the ballots, which was counted by the selectmen as one vote.

The committee on elections, to whom the case was referred, being thereunto authorized by the house, and at the request of the petitioners and of the respondent, appointed a commissioner to take testimony; and no other evidence except the depositions taken by him was introduced before the committee.

The objections to the voters above-named were, that they had not paid the requisite tax to entitle them to vote at the election. It was in evidence, by the deposition of Elisha Cranston, who was the collector of taxes in Ashfield, for the years 1847 and 1848, that neither of the persons named paid any tax in Ashfield during those years; and by the testimony of Foster R. King, collector for 1849, that their names were not on the lists for that year, when committed to him; but it further appeared, by the testimony of David Gray, one of the assessors, and also a selectman of Ashfield, that on the second Monday of November, 1849, after the poll had been opened, the assessors assessed a tax against McLanathan, and his name was thereupon entered on the list of voters; and that

a similar assessment was made on the fourth Monday, against Hoyt, Dixon, and Putney, (the two last after the poll had been opened on that day,) and their names were then put on the list of voters.[1]

By the depositions of Putney and McLanathan, it appeared, that they voted at the election, when the sitting member was chosen, but it did not appear for whom they voted. It was in evidence, also, that Dixon voted, but it did not appear for whom.

It was in evidence that Hoyt voted in the election; but as to the person for whom he voted, there was conflicting testimony. Being inquired of for whom he voted, he stated that he was unwilling to answer the question, and it was thereupon waived. In reference to this point, the following evidence was introduced. David Gray, who was one of the selectmen, testified as follows:—

"There was a crowd around the poll, when Hoyt voted. Hoyt entered the space between the railing and the seat of the selectmen, at the south end of the railing. I do not know but he entered the space at the north end of the railing, and then came back, and went in at the south end when he voted. When Hoyt voted, Allen Phillips stood off ten or twelve feet, I should think, from the seat where the selectmen sat, and stood in front of their seat. I think Phillips could not see Hoyt's vote where he stood; I think I could not see the ballot of said Hoyt, had I been placed where Phillips stood. I did not hear Phillips ask Hoyt to let him see his, Hoyt's, ballot, nor did I see Hoyt exhibit the same to Phillips. I cannot say, whether persons stood between Phillips and Hoyt, when Hoyt voted, or not. I heard Phillips say, that Hoyt had the wrong ballot or vote, previous to Hoyt's voting."

Francis Bassett testified as follows:—

"I attended the election of representative in Ashfield, on the fourth Monday of November last. James Hoyt, of Ashfield, told me that he voted for Mr. Blake. He said it was the Blake that was in Crafts's store. Hoyt said it was his vote that elected him, or that Blake got in by his, Hoyt's, vote. Crafts has a partner in his store by the name of Blake. Hoyt never told me that he voted for Hosea Blake. The partner of Crafts is not Hosea Blake."

Allen Phillips testified as follows:—

"I was present at the election held in Ashfield, on the fourth Monday of November last. James Hoyt was present at that election, and voted in the same; and said Hoyt voted for Hosea Blake, for representative for said town of Ashfield, to the general court. I saw him, the said Hoyt, vote. I asked Hoyt to show me his vote, and he held it up, so that I saw it. Hoyt then deposited that vote in the ballot-box. I could and did read the name on the ballot which Hoyt deposited in the box."

[1] It is not stated in the evidence, though such must have been the fact, that the taxes thus assessed were paid.

On the other hand, Hoyt himself testified, that, on the fourth Monday of November, he did not show his vote to Allen Phillips, nor did Phillips see the same; that Phillips did not ask him to show his vote; but that he did not hold his vote in such a situation, that no one could see it before it was put into the ballot-box.

The petitioners introduced, as a witness, Martin W. Phillips, whose name not being on the petition, the sitting member objected, on that ground, to his testimony. His evidence was as follows:—

"I am a resident of Ashfield. I was present at the election there on the day when Mr. Blake was elected; it was the twenty-seventh day of November last. I voted for representative at said election. I voted for Hosea Blake for representative. I was twenty-one years of age on the twenty-fifth day of November last I paid a highway tax in eighteen hundred and forty-nine, and have paid no other tax. I do not know the time my name was put on the list of voters. I did not request the selectmen to put my name on the list. I worked out the highway tax that I paid."

The sitting member introduced the depositions of Strong Packard and Alvan C. Hitchcock, to prove that they were not legal voters, and that they voted against him at the election.

The former testified, that he was twenty-one years old on the 13th of July, previous to the election; that, until the 10th of that month, when he came to Ashfield to reside, he had lived at Plainfield, with his father; and that he voted in Ashfield, on the fourth Monday of November, when the election took place, for Samuel W. Hall.

The other witness testified as follows:—

"I, Alvan C. Hitchcock, of Conway, in the county of Franklin, and commonwealth of Massachusetts, of lawful age, do depose, testify, and say, that I now reside in Conway. I am a single man. My father resides in Conway, and has always resided there. I am twenty-eight years of age. I have resided in Ashfield, in said county, since the fourth day of December, eighteen hundred and forty-eight, until the Saturday before the fourth Monday of November, eighteen hundred and forty-nine, when I left and went to my father's in Conway. While I resided in Ashfield I worked for Darius Williams. I was at my father's on the morning of the fourth Monday of November last. I attended the election in Ashfield on the fourth Monday of November, and voted for representative. I did not vote for Hosea Blake for representative. I have not worked in Ashfield since I left, on the Saturday before the fourth Monday of November last. I went to Conway after I voted, on Monday night. I had no contract to work for Williams after that time. When I came to work for Williams I engaged for no particular time. I have got my living by working at different places, in Conway and Ashfield. I have peddled sometimes. When I have been out of business I have always staid at father's."

Question by petitioners.—When you left Ashfield, on Saturday, for Conway, did you intend to return and vote in Ashfield on Monday?

Answer.—I did.

Question by same.—Was it your intention to retain your residence in Ashfield until after election, that you might vote?

Answer.—It was.

The committee concluded their report as follows:—

"The committee, believing it to be their duty to collect the facts bearing on the case, have here presented the testimony before the house, and it only remains for them to state to the house their own conclusions, drawn from this testimony.

The committee were satisfied, that the four persons named in the petition were not legal voters, and that they voted at said election. It has been decided by former houses, that when a sufficient number of votes to change a majority are illegally received or rejected, the election is void.

The committee thought it was not necessary to apply so stringent a rule to the present case. They were satisfied, that James Hoyt voted for said Blake; that the testimony of Allen Phillips, although contradicted by Hoyt, in certain particulars, is confirmed by that of Francis Bassett and David Gray, in its essential points, and is worthy of credit.

With regard to the testimony of Martin W. Phillips, the only objection urged by the sitting member, against its reception by the committee, was, that his name was not mentioned in the petition. The petitioners asked leave to amend their specification so as to include his name.

The committee considered that said Blake had opportunity to rebut the testimony of Phillips, if it had been possible to do so; that the existence of such evidence, if rejected by the committee, would be sufficient ground for another petition and another investigation. They, therefore, did not think proper to reject it. By his deposition, it appears, that he was not a legal voter, he never having paid a state or county tax, in accordance with the requisitions of the seventeenth section of the fifteenth chapter of the Revised Statutes. The committee were satisfied, that he was not a legal voter, and that he voted for said Blake.

The sitting member relied on the depositions of Strong

Packard and Alvan C. Hitchcock, to sustain his claim to a seat. The committee had no doubt that Strong Packard was not a legal voter, and that he voted for one of the other candidates at said election.

To the vote of Alvan C. Hitchcock, it was objected, that he never acquired any domicil in Ashfield, and if he had, that he abandoned it on the Saturday before the election. The committee have endeavored to be guided in this matter by the opinions of the supreme judicial court.

He had resided in Ashfield almost twice as long as the term of time required by the statute. He had paid taxes for that year in that town, and the committee were of the opinion, that had he not left on the Saturday previous to the election, his right to vote in Ashfield would not have been questioned. They then applied the general principle as laid down by the court, 'that the intention must be coupled with the act.' He testified that when he left, at the time mentioned, he did not remove his clothes and other effects, and that he intended to return and retain his domicil in Ashfield. The committee were, therefore, of opinion, that he was a legal voter.

The committee, having rejected one vote cast against the sitting member, and two that were given for him, and he having been declared to be elected by one vote, recommend the adoption of the following order: —

Ordered, That the seat of Hosea Blake, returned as a member of this house from Ashfield, be, and hereby is, declared vacant."

The report was considered on the second of March,[1] when it was moved that it should be amended by striking out its conclusion and inserting, in lieu thereof, "that the petitioners have leave to withdraw their petition." Pending the question on this amendment, the subject was debated on the day above named, and also on the fifth[2] and sixth[3] of March, on which last day the amendment was adopted, and the report, so amended, was agreed to.

A resolve[4] was subsequently passed "to pay the expense of the Ashfield election case."

[1] 72 J. H. 385. [2] Same, 394. [3] Same, 399. [4] Same, 459, 485, 503, 513, 573.

CASE OF WILLIAM O. ANDREWS, MEMBER FROM MIDDLETON.

Where a representative, after taking his seat in the house, leaves the commonwealth, without expecting to return before the prorogation of the general court, of which he is a member, a precept will not issue for a new election.

On the twenty-sixth of February, the petition of A. E. Hutchinson and fifty-nine others, of Middleton, was presented to the house, and referred to the committee on elections.[1] The petition alleged that William O. Andrews, the representative returned from that town, had departed from the commonwealth, with no expectation of returning before the final adjournment of the legislature, and that consequently the inhabitants of the town were deprived of the enjoyment of their right to be represented in the house. The petitioners, therefore, prayed that a precept might issue for the election of a representative in the place of said Andrews.

It was generally stated and believed, at the time, that Mr. Andrews, after holding his seat a short time, had sailed from a northern port on a voyage to California, so that, unless some accident occurred to prevent the accomplishment of the voyage, he could not possibly return to the commonwealth for a period of, at least, five months.

The committee, on the first of March, reported,[2] without giving any reason for their conclusion, that the petitioners should have leave to withdraw their petition, and on the sixth of March, this report was agreed to.[3]

On the second of May following, the committee on the pay-roll were directed to cause any sum that might be due to Mr. Andrews, for travel and attendance, as a member of the house, for the session then about to close, to be made payable to his wife.[4]

[1] 72 J. H. 350. [2] Same, 377. [3] Same, 393. [4] Same, 756.

1851.

COMMITTEE ON ELECTIONS.

Messrs. *Nathaniel Wood*, of Fitchburg, *Hart Leavitt*, of Charlemont, *William Schouler*, of Boston, *John T. Paine*, of Melrose, *Augustus Story*, of Salem, *Everett Robinson*, of Middleborough, and *Richard A. Palmer*, of New Bedford.

STERLING.

The presiding selectman, at a meeting for the choice of a representative, having suppressed debate on a motion, "to proceed to another ballot," which he did not hear made; it was held, that such suppression was not improper.

The poll is not opened in a disorderly manner, merely because there is considerable noise and disorder, at the time, provided there is no improper voting.

The election of Luther W. Rugg, returned a member from the town of Sterling, was controverted by J. N. Tolman and fifty others, on three grounds:—

1st. That the poll was opened after five o'clock in the afternoon.

2d. That the presiding selectman improperly stopped debate.

3d. That the poll was opened in a disorderly manner, and votes were deposited in the ballot-box, before the names of the voters were called.

It appeared, in evidence, before the committee on elections, to whom the case was referred, that on the second of November, the day of the annual state election, there was no choice of representative, and that the meeting was adjourned until the next day, at ten o'clock in the forenoon, on which day three unsuccessful ballotings took place, at which the whole number of votes was, on the first, 318, on the second, 319, and

on the third, 328, and of which, the sitting member received, at the first, 149, at the second, 153, and at the third, 160 votes.

The report of the committee then proceeds as follows :—

" Upon the declaration of the third balloting, a motion was made 'not to send,' which, upon a poll of the meeting, was declared not to be carried. There was then a motion made to adjourn, which was tried in the same way, and decided not to be carried. The chairman declared the vote, and at the same time called for another balloting. It appeared also in evidence, that at the same moment in which the chairman was declaring the result of the vote on the motion to adjourn, and calling for a new balloting, a motion was made that 'we now proceed to a new ballot.' This motion, the chairman did not hear; nor did he know of it until sometime afterwards. To this motion, Dr. Daniel Mann rose to speak and addressed the chair. He proceeded to speak, and the chairman called him to order, as discussion was not in order when the balloting was proceeding. After which, Dr. Mann says he attempted to speak two or three times, but was not allowed. He then rose and remonstrated against the proceedings as irregular and illegal, and advised all who were opposed to them to leave the room and not vote, and a large number then withdrew with Dr. Mann. The voting then proceeded quietly, and the poll having been kept open a sufficient length of time, Mr. Rugg was declared elected; he having received 148 votes out of a poll of 161.

In the opinion of the committee, the decision of this case turns upon the question, whether the poll was opened, for the choice of representative, after five o'clock in the afternoon.

The petitioners produced a number of witnesses, who testified that it was past the hour of five, when they heard the chairman declare that the poll was open. Some ten or twelve watches were examined at or about the time that Dr. Mann tried to get the floor to speak, and they showed that the hour of five had gone by. By Mr. Samuel Lawrence's watch, it was five minutes past five. Mr. Hobart said it was twenty minutes past five. Mr. George Buttrick said it was three

minutes past five when the chairman declared the poll open. Joel Pratt said it was between four and five minutes past five when the poll was declared open; other witnesses testified to the same general facts.

On the other hand, the chairman of the selectmen, before opening the poll in the morning, compared his watch with that of Dr. Peck, the town clerk. The town clerk's watch was from ten to fifteen minutes faster than the chairman's watch. He (the chairman) then stated to the town clerk, 'I shall be governed by your watch.' When the chairman was told by Mr. Hosmer, on the day of election, that it was past five when the last balloting had commenced, he replied, 'it is not past five by the town clerk's watch, he had been by that all day, and should continue to go by it.' And it appeared in evidence, that it wanted ten minutes to five, when the chairman declared the poll open for the last balloting. The town clerk testified, that he compared his watch with two or three watches that evening, and they were slower than his; one, Mr. Raymond's watch, had just come back from Worcester, where it had been to be regulated, and it was slower than the town clerk's watch. The town clerk's watch also agreed with his clock at home. It appeared in evidence, also, that esquire Houghton told the chairman of the selectmen, when he declared the poll open, 'that he was just in time.'

The discrepancy, as to the time of opening the poll, may be accounted for by the fact, that the witnesses examined for the petitioners did not know that the poll was open, until the chairman called Dr. Mann to order. The poll had been opened before that time, and all the names beginning with 'A,' had been called.

As regards the second charge, that the chairman would not allow debate, we have the testimony of the chairman, that he heard no motion made 'to proceed to another ballot,' and it was this motion which Dr. Mann rose to discuss. The chairman, not aware that any motion had been made, declared Dr. Mann out of order. It appeared in evidence, that the motion here referred to was made by Deacon Cyrus Holbrook, who was

examined by the committee. He said, he 'noticed that the chairman did not hear his motion.' 'I saw,' said he, 'the impropriety of it, and did not renew it, and I considered my motion as withdrawn.'

As regards the third charge, that the poll was opened in a disorderly manner, and that votes were put into the ballot-box before the names were called, the evidence is, that at the time that Dr. Mann rose to speak, and while he was attempting to speak, there was considerable noise and disorder. The meeting was excited, but it does not appear that any ballots were put into the box, without the names of the voters being checked; as strong proof of this, the chairman of the selectmen testified, that he examined the checks on the voting list, after the meeting, and found the checks to correspond exactly with the number of votes cast.

These, the committee believe, are the substantial facts as developed by the evidence, and they decide that the petitioners have failed to make out their case, and that the sitting member, Luther W. Rugg, was duly elected a representative from the town of Sterling, and that he is entitled to his seat."

The report was agreed to.[1]

HANOVER.

The warrant and notices, for a meeting for the election of representative, which were dated on the 16th of November, 1850, having directed the electors to meet on Monday, the 25th of November *next*, "to choose a representative to represent them in the general court, to be held at Boston, on the first Wednesday of January next;" it was held, that the informality of the warrant and notices was not sufficient to invalidate an election on the 25th of November, 1850.

The election of John S. Barry, returned a member from the town of Hanover, was controverted by John Cushing and others, and reported upon by the committee on elections, as follows:—

"The only allegation made by the petitioners, as affecting the right of the sitting member representing the town of Han-

[1] 73 J. H.

over, is, that the town-meeting held on the twenty-fifth day of November last, at which said Barry was declared to be elected, 'was illegal and void, inasmuch as a part if not all of the certified warrants, ordering said meeting, required the same to be held on the twenty-fifth day of November, eighteen hundred and fifty-one.'

It appears, from a copy of the warrant on the town records of Hanover, and from the warrants posted up at the usual places within the town, that the inhabitants of Hanover were notified to meet on Monday, the twenty-fifth day of November *next*, at eleven of the clock in the forenoon, then and there to act on the following article:—

'To choose a representative to represent them in the general court, to be held at Boston, on the first Wednesday of January next.'

The warrant and the posted copies were dated the sixteenth day of November, in the year one thousand eight hundred and fifty.

By a strict construction of the language of the warrant, the inhabitants were notified to meet on the twenty-fifth day of November, 1851. But the committee do not think any misunderstanding could have existed as to the true intent and meaning of the warrant. No individual could suppose that a meeting of the inhabitants, to be held in November, 1851, would be notified in November, 1850. And the object of the meeting, as stated in the warrant, is solely 'to elect a representative to the general court, to be held in Boston, on the first Wednesday of January next;' that is, 1851. It may be noticed, also, that the twenty-fifth day of November, 1851, will not fall upon Monday.

But, aside from these considerations, it has not been made to appear to your committee, that any misapprehension did in fact exist, in the mind of any one, as to the purpose of the warrant, or that any individual has been debarred the privilege of exercising his right to vote, or that any one was detained from the polls, in consequence of the ambiguous language of the warrant.

The committee are therefore of the opinion, that the petitioners have not made out a case affecting the right of the sitting member to a seat in this house, and they therefore recommend that the petitioners have leave to withdraw."

The report was agreed to.[1]

WEST NEWBURY.

Where a meeting was held, for the election, at the same time, of governor, lieutenant-governor and senators, representative in congress, and representative in the general court; and three separate boxes properly labelled were provided for the reception of the votes; it was held, that a ballot marked for "representative to congress," and describing the candidate therefor, as an inhabitant of another town, found in the box appropriated to the votes for representative in the general court, could not be counted to make up the whole number of votes given for the latter.

The election of Benjamin Edwards, returned a member from the town of West Newbury, was controverted by A. W. Noyes and others, on the ground, that he did not receive a majority of the votes given in at the balloting, at which he was declared to be elected. The committee on elections reported thereon as follows:—

"At a hearing of the parties in the above case before the committee, the petitioners produced a copy of the record of the doings of said town of West Newbury, at the town-meeting, held on the 11th of November last; so far as it related to the choice of a representative to the general court, which is as follows:—

'Votes for representative to general court, as given in, November 11, 1850. Town of West Newbury. Whole number of ballots, 246,—necessary to a choice 124 votes. No one having that number, the chairman declared there was no choice. A call was made,—"How does the vote stand?" The chairman reported as follows:—Benjamin Edwards has 123 votes; John Moody, 81; Daniel Nichols, 25; James H. Duncan, 3; Thomas J. Chipman, 2; Alpheus R. Brown, of Lowell has 1.

[1] 73 J. H. 320.

'Moses Stiles, Moses Smith, J. C. Carr, Samuel Rogers, Jr., Samuel C. Noyes, Edward Knight, Stephen Brown, Jr., D. Robinson, B. P. Poor, John Carr, and Eliphalet Emery had one vote each.

'Two of the above votes for James H. Duncan, read as follows: "Representative to Congress for district No. 3, James H. Duncan, of Haverhill."

'After some discussion in regard to the propriety of counting the votes for representative to congress, for a representative to the general court, on motion, it was voted, that Benjamin Edwards be declared elected representative to the legislature of Massachusetts for the ensuing year,—and that the whole facts as to the individuals voted for be sent up to said legislature.—104 to 48.'

And the committee found attached to the usual certificate of Mr. Edwards's election, which was certified by a majority of the selectmen of West Newbury, an attested copy of the record as above set forth.

It will be perceived, that if the two votes having thereon the name of James H. Duncan, of Haverhill, with the words 'Representative to Congress, for district No. 3,' preceding it, had been excluded, and not counted in the number of ballots cast for representative in the general court; then the whole number of ballots would have been 244; necessary for a choice 123,—and as Mr. Edwards had 123 votes, he would have been elected.

The whole question turns upon the point, whether the Duncan votes, described as aforesaid, should or should not have been included in the number of ballots given for representative in the general court.

It was proved, that at said November meeting, the town was balloting for governor, lieutenant-governor and senators; for a representative in congress; and for a representative in the general court, at the same time; and there were three poll-boxes standing side by side upon the front of the desk, properly labelled, and designating the kind of votes to be deposited therein. The check list was called but once; and each

voter was required to deposit his vote for each of the above officers, at the same time, in the respective boxes, labelled as aforesaid. It was also proved, that there was no person, known as a resident of West Newbury, by the name of James H. Duncan. It was also proved, that in the poll-box, labelled for representative in congress, there was found, when the ballots deposited therein were counted, one vote in writing with merely the name of Benjamin Edwards thereon,—that all the votes cast for Mr. Edwards were in writing,—and all the votes cast for James H. Duncan, were printed.

No evidence was offered to prove that there was any error or mistake in depositing ballots in the wrong box; other than results from the foregoing statement.

The committee have been desirous, in the examination of this case, to follow the spirit of the statute of this commonwealth, regulating elections, and to ascertain from the foregoing facts the whole number of persons, who voted at said election for representative to the general court. Did those two persons, who put in the two votes for James H. Duncan, as above described, intend to vote for him as a representative in the general court? If they did so intend, then most certainly they ought to be counted as such, and Mr. Edwards was not legally elected. But if that was not their intention,—and the depositing of said votes was under a mistake, and unintentionally,—then we shall not get at the true number of persons voting for a representative in the general court, by counting the whole number of separate ballots given in and found in that box.

A person, to secure his election, must have a majority of the whole number of ballots given in at the election. And at a choice of representative in the general court, no person is elected unless he has a majority of all the ballots given for that office.

A majority of your committee are of opinion, from all the circumstances in this case, that the two votes cast for James H. Duncan, as aforesaid, were not intended by those who carried them to be votes for a representative in the general court;

that they got into the representative box by mistake; and that they ought not to have been included in the whole number of ballots given in at the election of a representative in the general court.

Consequently, they are of opinion, that Mr. Edwards had a majority of the whole number of ballots given in at the election of a representative in the general court; and that he was legally chosen as such representative; that the selectmen did right in giving him a certificate of his election; and that he is legally entitled to retain his seat in this house."

The report was agreed to.[1]

NEEDHAM.

A meeting being held for the election of a representative, three ballotings took place, at the last of which an election was effected. At the first balloting, the names of all persons who voted were checked, according to the statute. At the two last ballotings, the names were not checked, but the list was held by one of the selectmen, and so far used, that no person was permitted to vote, until it was ascertained that his name was on the same; it was held, in the absence of all fraud, or double voting, that the neglect to use the check list did not invalidate the election.

The election of Henry Robinson, returned a member from the town of Needham, was controverted by Daniel Kimball and others, on the ground, that the meeting at which the election took place was disorderly; that votes were put into the ballot-box in an irregular and illegal manner; and that the check list was not used in the manner prescribed by the statute.

The committee on elections, to whom the petition was referred, reported thereon the evidence adduced in the case, together with their conclusions of fact and law thereupon, as follows:—

"That the meeting in the town of Needham, at which the sitting member claims to have been elected, was legally called and properly conducted, except that on the trial where the member claims an election, the names of persons voting were not checked by the presiding officers, or by any person appoint-

[1] 73 J. H. 326.

ed by them therefor, as required by the act of 1839, c. 42, 'concerning elections.'

At said meeting, there were two unsuccessful trials to elect a representative, and the member contends that he was elected on the third.

At the first trial, all persons voting were checked, agreeably to the requirements of law. On the second and third trials, the names of persons voting were not checked, as before named, but the check list was held by one of the selectmen, and used, so far as that no person was permitted to vote, until it was ascertained by the selectmen that his name was on the list.

The selectman holding the ballot-box was personally acquainted with nearly or quite all the voters in town; and, on the third trial, only one person offered to vote of whose right he had doubts, and that person was not allowed to vote, till it was found that his name was on the list.

It has been the custom in the town of Needham, since the passage of the said act of 1839, not to check the names of persons voting, after the first ballot, but to use the check list in the manner before described.

There is no evidence of any fraud or double voting on the third trial, or at either of the preceding trials.

A majority of the committee regard the aforesaid act of 1839 as only directory, and that it was not the intention of the legislature, that the neglect of the selectmen, to obey the requirements of this law, should operate to disfranchise the citizens of a town, and thwart the wishes of the voters, fairly and honestly expressed at the ballot-box; but that the penalty of two hundred dollars, provided by the act of 1839, should rest upon and apply to the only offending parties, the selectmen, as an atonement for the neglect of a plain duty; and that this punishment would be a sufficient guaranty for the enforcement of a due observance of the law.

The requirements of this law are the same, with regard to the use of the check list, in voting for governor, senators, electors of president, &c., and representatives in the general court; and it is believed that it could not have been the intention of

the legislature, to place at the disposal of a board of selectmen the political interests of the state and nation, and allow them, at pleasure, either directly or indirectly, to annul the right of suffrage.

A majority of the committee, therefore, respectfully report, that Henry Robinson, now holding a seat in this house, as representative from the town of Needham, was duly and legally elected, and is entitled to his seat."

The report was agreed to.[1]

GEORGETOWN.

B., a minister of the gospel, having closed an engagement as such in E., where his family continued to reside, went to G. in September, 1849, and, after preaching to a society there a short time, made an engagement with a committee of the society, to continue his services until the first day of March then next, at which time the committee's authority expired. This engagement was made after an unanimous expression of a desire, at a voluntary and informal meeting of the society, that B. should be engaged, with a probable view to his settlement for a year from the first of March, as had been the custom of the society. The society thereupon gave up a candidate whom they had previously employed and intended to settle; and B. gave up a partial engagement which he had made to preach with another society. B. was informed by the committee, that the society were well pleased with him, and that his stay with them would probably be permanent, and he expressed his intention to remain. B. preached at G. on the 21st of November, and on three other Sundays in the same month, boarding at the hotel in G. while his family remained in E. During this time, B. was looking for a house in G., but had some difficulty in finding one. B. continued to preach in G., to which he removed his family in December, 1849, and was residing there at the time of the general election in November, 1850, when he was elected and returned a member from the town of G. It was held, upon the foregoing which were the principal facts in the case, that the inhabitancy of B. in G., for a year previous to his election, was not thereby disproved.

The election of Henry H. Baker, returned a member from the town of Georgetown, was controverted by Jeremiah Russell and others, legal voters of that town, on several grounds, (the first of which only was insisted upon,) which appear in the following report of the committee on elections:—

"The objections set forth in the petition against the sitting member, are:—

1st. That the said Baker had not, at the time of his election

[1] 73 J. H. 554.

as a representative, been an inhabitant of said town of Georgetown for one year previous to the time of his said election.

2d. That the check list was not used at said election, agreeably to the provisions of the law in such cases provided.

3d. That a large number of illegal votes were deposited in the ballot-box, at said election for representative as aforesaid.

The principal facts in the case are these. Mr. Baker is a clergyman, and formerly preached at Essex, where he was residing with his family, in September, 1849. His engagement at Essex expired the spring previous, and he had no occupation or relations there, and was a candidate for any vacant pulpit. He preached in Georgetown by invitation, in September, as a candidate, the society being in the habit of settling ministers by the year, and the year commencing March 1st. A committee was chosen who had power to employ clergymen during the year for which they were chosen. This committee wrote to Mr. Baker, informing him that his preaching had been acceptable, that the society were desirous of hearing him again, and that they would probably settle him for a year, if they should like him as well as they had done before. In compliance with this invitation, Mr. Baker preached in Georgetown, October 21st; and, after the services, a voluntary meeting of the members of the society was held, at the request of the committee, and a unanimous desire was expressed, that Mr. Baker might be engaged. There was some conflict of evidence, as to whether it was voted at this meeting, that Mr. Baker should be engaged for three months, or only for four weeks; but it was shown that this meeting voted to give up Mr. Robinson, who had been a candidate, and whom they had intended to settle as a preacher. It was also proved, that Mr. Baker was, on the next day, October 22d, engaged by the committee, whose right so to engage him was admitted, to preach for four Sundays and for three months, to end March 1st, when the committee's term expired. This offer Mr. Baker accepted, and gave up a partial engagement which he had at another place. Mr. Baker was also informed, by the committee, that the society were well pleased with him, and that his

stay with them would probably be permanent; and he expressed his intention to remain.

Mr. Baker preached in Georgetown, November 4th, and three other Sundays in the same month, boarding at the hotel, dividing his time between Georgetown and Essex, where his family continued to reside. During this time, he was looking for a house in Georgetown, but met with some difficulty in finding one. Another informal meeting was held in November, and one December 2d. The first record of a vote to employ Mr. Baker is found to be dated December 2d. But it appeared, by the testimony of several persons, that neither this nor any other of the meetings was a legal one, formally called, but that all were voluntary meetings, held in compliance with a request made on the day of the meeting, in order to get the views of members. It also appeared, that at the three meetings held in November and December, several other votes were passed, no one of which was recorded. The clerk, as well as several others, also testified, that in his opinion, a similar vote to that of December 2d was passed at the October meeting.

A short time before thanksgiving day, Mr. Baker's family went eastward on a visit, and did not return to Essex, but went to Georgetown in the early part of December. On the 9th of December, Mr. Baker's furniture was removed to Georgetown, while his family was absent. Mr. Baker was not in Essex, except at the time of removing his furniture.

A check list was produced, bearing a cipher, made with a pencil, nearly opposite the name of Mr. Baker, and it was testified that such marks were used to designate those who voted at the November election of 1849. It was also shown, that this list had been used for two or three years, and at repeated elections, both before and since November, 1849; that similar marks had been used at different elections, and that the selectmen, since November, 1849, had attempted to erase the marks on the list with India rubber. It was further testified, that the check list was kept in an exposed situation, where it could be examined by any person, and that, before this hearing, it was

brought from its place of deposit by a person who was not produced as a witness.

A witness living in Georgetown also testified, that he overheard a conversation, on the Sabbath previous to the November election, 1849, when Mr. Baker stated, that he was going to Essex, to vote against one Mr. Prince, on the next day. But a witness, living in Essex, testified, that Mr. Baker declined voting at the election in November, 1849, at Essex, because of his removal to Georgetown. This witness was a vote distributor for Mr. Prince, and, through the afternoon when the Essex election took place, stood near Mr. Baker, who was distributing votes against him; and they debated the matter until near the closing of the poll, when they were urged to come and vote. Mr. Baker declined, giving the reason above stated. The witness voted, returned at once, found Mr. Baker on the outside of the building, and had a further conversation with him.

One witness testified, that Mr. Baker admitted to him, that he told one Edwards that he had voted for Mr. Cass in 1848, and that afterwards, having heard Mr. Phillips lecture, he had voted for him in 1849. Mr. Edwards, however, testified that he had had no such conversation with Mr. Baker, but that Mr. Baker had told him that he voted for Phillips in 1848. The statement of the first witness was explained by the fact, that the governor's election in 1848 was on a day subsequent to the presidential election, and that the witness, hearing Mr. Baker say that he voted for Mr. Cass in 1848, and afterwards for Mr. Phillips, and forgetting the time of the governor's election, supposed that he spoke of the election of 1849. This witness afterwards admitted, that he might have made this mistake, and that his evidence might have been wrong. Some other evidence was also produced, to show that Mr. Baker did vote for Mr. Phillips in 1848.

The only question to be settled in this case is,—had Mr. Baker been an 'inhabitant' of the town of Georgetown for one year previous to his election? if he had been, then he should retain his seat; if otherwise, he should not.

In deciding the question of Mr. Baker's right to retain his seat, certain principles of law will be found to be applicable:

1st. The burden of proof is on the petitioners.

2d. The word 'inhabitant' in the constitution is equivalent to the idea conveyed by the word domicil. See *Opinion of the S. J. Court*, 5 Met. 588; *ante*, 510.

3d. Every man must have a domicil somewhere. *Abington* v. *W. Bridgewater*, 23 Pick. 170; *Thorndike* v. *Boston*, 1 Met. 245; *Opinion of the S. J. Court*, 5 Met. 589; *ante*, 512.

4th. The declarations of a party as to his intent or expectation are good evidences thereof, and in a doubtful case, his mere election of a domicil may determine the question. *Kilburn* v. *Bennett*, 3 Met. 199; *Lyman* v. *Fiske*, 17 Pick. 231.

5th. The loss of a former domicil, and the acquisition of a new one, are simultaneous. See *Opinion of the S. J. Court*, 5 Met. 589; *ante*, 512.

6th. A man's domicil is that place where he is situated voluntarily, and with the intent to remain permanently.

Upon these principles, we think that the petitioners have failed to show, that Mr. Baker was not an inhabitant of Georgetown for one year previous to November 11th, 1850, but that it does appear that he was, at least as early as November 4th, 1849, situated in Georgetown with the intent to remain there permanently. At this time he had no occupation in Essex and no motive to remain there. He had an occupation in Georgetown; he preached there, and performed the duties of a pastor; and he was (October 22d) engaged to remain there until March 1st, 1850. He had also a well-grounded expectation, that he should continue there permanently, from the unanimity of the society, from the expressions of the committee, and from the vote to break off the partial engagement with Mr. Robinson, who was to have been settled over the society. The evidence of his intention is as clearly proved, as it can be in almost any case, if not in any case. He concluded an engagement with the committee, and gave up preaching as a candidate in another town. He did not move his family to Georgetown, partly because he had some difficulty in obtain-

ing a house, and partly because they were to visit Maine before they went to Georgetown. But their transient stay in Essex did not make Mr. Baker an 'inhabitant' in that town, any more than their transient visit to Maine transferred his domicil to that state. The mere fact, that a man's family resides in any given place, does not necessarily fix his domicil there; nor does the position of his furniture control his residence. *Fitchburg* v. *Winchendon*, 4 Cush. Rep. 190. A man is certainly entitled to a reasonable time to remove his family and furniture, after changing his own abode, and during this time, he ought not to be cut off from the privileges that result from having a domicil. It is to be noticed, that Mr. Baker was as fully engaged in October, and as fully determined to remain in Georgetown, as at any subsequent time; and when he hired his house, he had no other engagement than that of October 21st and 22d.

Another strong proof of Mr. Baker's intention, as to his residence, is found in his declining to vote in Essex in 1849; we think the testimony, introduced to show that he did vote there, altogether too loose and unsatisfactory to establish that point. And the evidence that he did not vote, and that he declined to do so, on the ground of his change of residence, is positive and decisive. It is clear, that under the circumstances, especially after this declaration, Mr. Baker could not have voted at Essex on November 11th, 1849; it then necessarily follows, that if he had lost his domicil in Essex, he had gained a domicil in Georgetown, for 'every man must have a domicil somewhere,' and 'when he loses the old one, he gains a new one.'

To illustrate our views, we think that if the same state of facts had existed on May 1st, that did exist on November 11th, Mr. Baker would clearly have been taxable in Georgetown, and not in Essex; if this be so, his domicil was in Georgetown, and he continued to reside there for a year before the election in 1850.

The committee are, therefore, of opinion, that Henry H. Baker, the sitting member from the town of Georgetown, is

entitled to his seat, and recommend that the petitioners have leave to withdraw their petition."

Two members of the committee, (Messrs. *Story* and *Schouler*,) dissenting from the conclusions of the report, presented their views of the case to the house, as follows:—

"The undersigned have not deemed it necessary to submit a detailed statement of the evidence in this case, as the material facts appear in their report, and in that submitted by the other members of the committee, who were present at the hearing of this case. But the undersigned desire to suggest, that they do not consider the statement of evidence, made by the other members of the committee, to be entirely accurate, and in some important respects they think it erroneous. The undersigned will, however, content themselves with referring to their minutes of the evidence, when the case shall be heard before the house.

The right of Mr. Baker to his seat was resisted principally on the ground, that he had not been an inhabitant of the town of Georgetown, for one year next preceding his election as representative, and was consequently ineligible to such office. The constitution, c. 1, art. 3, requires that a person, to be eligible to the house of representatives, shall, 'for one year next preceding his election, have been an inhabitant of the town he shall be chosen to represent.'

The question submitted is, whether Mr. Baker had been an inhabitant of Georgetown for one year next preceding his election, which was on November 11th, 1850. In the constitution, c. 1, sec. 2, art. 2, the word 'inhabitant' is thus defined:— 'Every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within this state, in that town, district, or plantation, where he dwelleth, or hath his home.' Did, then, Mr. Baker dwell or have his home in Georgetown, for one year next preceding his election? From and upon the evidence submitted to the committee, we think it was conclusively proved, that he did not dwell or have his home in that town, for one year next preceding the 11th of November, 1850.

It was proved, that for some years immediately preceding

his residence in Georgetown, he had resided in the town of Essex, with his wife and family; that he preached in Georgetown on the last Sunday of September, 1849, and again on the third Sunday of October following. On this last-mentioned day, a vote was passed by the society, requesting their committee to employ him to preach for four Sundays, and to raise a subscription to pay him. From that time to December 2d, 1849, he preached at Georgetown every Sunday but one. On December 2d, the society passed a vote instructing their committee to employ him for three months. About a week after this, Mr. Baker removed his furniture from Essex to Georgetown, and his family soon after took up their residence in Georgetown. It appeared, that up to December 9th, he spent most of his time in Essex.

The check list of the town of Essex, for the year 1849, was produced by one of the selectmen of that town. Mr. Baker's name was on it, and was checked with the usual mark employed to designate those who voted at the annual meeting in November, 1849.[1] It was also proved by Dr. Cogswell, of Georgetown, that on the Sunday preceding the annual state election in November, 1849, Mr. Baker told him he wished to go to Essex that night, and gave as a reason, that he wanted to get back to town-meeting, to vote. He said a man by the name of Prince was a candidate for representative from Essex, whose election he wished to defeat. He did start to go to Essex that night.

Col. Kimball, of Georgetown, also testified, that Mr. Baker told him, the day after his election in November last, that he voted for Cass in 1848, and for Phillips in 1849. Mr. Baker produced a witness to rebut this, who stated that he was with Mr. Baker on the day of the election in November, 1849, outside of the room in which the citizens voted, and that he was with or near him most of the time the polls were opened, and did not see him vote; and further, that Mr. Baker said he

[1] It is stated in the report made by the other members of the committee, that the check mark used at the annual meeting in November, 1849, had been used at previous meetings, on the same check list. This evidence is entirely opposed to the recollection of and to the minutes of evidence taken by the undersigned.

should not vote there, (in Essex,) on account of his relations at Georgetown. The counsel, who appeared for the petitioners, offered to let Mr. Baker take the stand, and testify whether he voted in Essex, in 1849, which he declined doing.

Upon this evidence, we think it clear, that Mr. Baker was not an inhabitant of Georgetown, within the meaning and intent of the constitution, previous to December, 1849.

The ground relied upon by Mr. Baker was, that although his family was in Essex, in November, 1849, yet that it was his intention at that time to remove to Georgetown. We think that if he, previous to December, 1849, had any intention of thus changing his residence, it was not, and could not have been a settled intention. It was to depend upon future contingencies. This is clearly so, if he voted in Essex on the 12th of November, 1849, which was the day of the annual state election, and we think the evidence is very satisfactory, that he did so. There are no facts tending to show, that any such intention was executed until the middle of December. In order that Mr. Baker's intention should avail him in this case, we think the circumstances should be such as to render the fact of his residence at least doubtful. If, for instance, he had removed his family to Georgetown previous to November 11th, 1849, that fact would not be conclusive of his intention to make that town his permanent home, and evidence of intention would have been important to determine of what place he was an inhabitant. Or, if he had engaged permanent lodgings at Georgetown, whilst his family was elsewhere, a question might arise, whether he intended to live apart from his family, and gain a residence in a different town from the one in which they resided. In such cases, where the actual facts leave the place of residence doubtful, intentions may prevail to show of which place the individual was actually an inhabitant. And it seems to us, that intentions cannot be important under any other circumstances. A man who resides with his family in one town cannot gain a residence in another town, until he removes his family there, merely because he intends to remove.

In these views, we are confirmed by the various decisions which have been made by the supreme judicial court of this state. In the case of *Williams* v. *Whiting*, 11 Mass. Rep., 424, the question was, whether the plaintiff had been domiciled in the town of Dedham for one year next preceding November 2d, 1812, and was consequently entitled to vote in that town on that day. The court say, (p. 432): 'On the 28th of October, in the preceding year, he (the plaintiff) received an appointment which rendered it convenient, if not necessary, for him to dwell in Dedham; and he then began to prepare for his removal. From that time until the 12th of November, he passed almost every day to Dedham, where he transacted his business, and returned to his family every night except three, on which he slept at Dedham rather by accident than design. He had also, on the 29th of October, engaged a house in Dedham; but he was not to occupy it until the 12th of November; on which day he removed his family, and became domiciled in Dedham. 'We are of opinion, that, under these circumstances, he remained an inhabitant of Roxbury, until the day of his removal with his family; and there can be no doubt that he might legally have exercised any of his municipal privileges there, up to that time. It follows, that he did not begin to be an inhabitant of Dedham, until after the 2d of November, 1811; and as the election, at which he tendered his vote, was on the 2d of November, 1812, he was not then entitled to vote, in consequence of having been an inhabitant of that town for one year next preceding the election.'

In *Jennison* v. *Hapgood*, 10 Pick. Rep., 98, the court say:— 'To prove a change of domicil, it must be made to appear, not only that the old domicil has been abandoned, but also that a new one has been acquired; so that a domicil, being once fixed, will continue, notwithstanding the absence of the party, until the substitution of a new one. The intention to abandon, and actual residence at another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time, will not produce a change of domicil.'

Since the hearing before the committee, Mr. Baker has refer-

red us to a decision of the supreme judicial court, not yet published, in the case of *Fitchburg* v. *Winchendon*, (4 Cush. 190,) and a copy has been obtained from the reporter. There is no intention expressed in that decision to overrule the former decisions of the court, and we think there is nothing in the language of the court, which can be construed into an intention to change the doctrines of former decisions. The only matter decided in that case is, that intentions, where there is an actual residence, are always competent evidence to show whether such residence is to be regarded as a permanent one. This is perfectly consistent with the other decisions.

In view of all the facts, as disclosed on the hearing in this case, under the decisions of our highest judicial tribunal, we think it has been satisfactorily shown, that Mr. Baker did not dwell, or have his home, in Georgetown, for the term of one year next preceding his election as a member of this house, in November, 1850, and we are therefore of opinion, that such election was void."

The report of the committee, that the petitioners have leave to withdraw their petition, was agreed to.[1]

MILFORD.

Whether the decennial census of the inhabitants of a town, taken by the assessors thereof, and returned into the secretary's office, as the basis of the representation of such town for the next ten years, can be shown to be erroneous, with a view to increase the town's right of representation—*Quære*.

The ground, upon which, (by an order of the house,) the election of one of the members returned from Milford was called in question, is set forth and considered in the following report of the committee on elections, which was made in the house on the 31st of January, and agreed to on the 5th of February following[2]:—

"The town of Milford, at their annual town-meeting in

[1] 73 J. H. 574. [2] Same, 188.

November last, for the choice of state officers, among other things, voted to choose two representatives, to represent them in the general court of this commonwealth; the selectmen then opened the poll, and called for votes for the first representative, and upon the votes being counted, Mr. Hiram Hunt, one of the present sitting members, was declared to be duly elected, and received from the selectmen the usual certificate of his election. Then the poll was opened, and votes were called for the election of a second representative; and Mr. Alfred Bragg was declared to be duly elected, who also received from the selectmen the usual certificate of his election.

It appeared in evidence, that the assessors of said town of Milford, agreeably to the provisions of the statute for such case made and provided, and in accordance with the constitution, had taken a census of the inhabitants of said town, and returned the same to the governor and council, wherein the number of inhabitants was 4,410; and that thereupon the governor, conformably to the requisition contained in the thirteenth article of the amendments of the constitution, had issued his proclamation, dated July 18th, 1850, declaring, that according to said census, the town of Milford was entitled, for the ensuing ten years, to one representative each year.

At a hearing before the committee, Mr. Bragg, one of the members elected as aforesaid, proposed to prove, if opportunity could be afforded, that the said assessors, in making up the enumeration of the inhabitants of Milford, committed errors, which could be clearly pointed out, as apparent upon their minutes; and that if the computation had been correctly made, the number of inhabitants of said Milford, on the first day of May last, was much greater than 4,680, which is the number requisite to entitle a town to two representatives. Mr. Bragg further stated, that, upon this supposition, which was very generally believed throughout the town, the vote to send two representatives was based.

The committee voted to give Mr. Bragg an opportunity to prove such matters and things as might be pertinent to the case. Subsequently, the committee were informed by Mr.

Bragg, that, upon a careful examination of the assessors, and their minutes of said census, he apprehended that he should not be able to make out so clear a case of errors and mistakes, as to warrant him in urging the propriety of going behind the census return; and he therefore should not urge any further his claim to a seat in this house, but should withdraw immediately.

The committee, therefore, feel themselves relieved from a question of some considerable embarrassment, which is this: Whether the said decennial census, which determines the right of representation of all our cities and towns, can be subsequently, and previous to the expiration of ten years, inquired into, and frauds or errors corrected? The words of the constitution are plain and peremptory. No provision is made for the correction of errors or of fraudulent conduct; and this would seem to lead to the conclusion, that towns must take the responsibility of selecting capable and honest assessors; and, if those officers do not perform their duties faithfully, correctly, and honestly, the towns themselves must suffer the consequences.

The committee, therefore, report that the election of said Alfred Bragg, as aforesaid, was null and void, and that he is not entitled to a seat in this house.

They further report, that as Milford is entitled to one representative, and inasmuch as Mr. Hunt was duly elected as such, that he is entitled to hold his seat as a member of this house."

PLYMPTON.

Where an election was controverted, on the ground, that previous to the balloting, at which it took place, a motion was seasonably made and seconded, not to send a representative, which motion the selectmen refused to put, but proceeded with the election; and the committee on elections reported thereon, that upon the evidence the motion was seasonably made, and not being put by the selectmen, the election subsequently effected was void. A minority of the committee submitted a report, concluding that the motion was not seasonably made, but that if it were, the election ought not to be thereby rendered void; and, consequently, that the petitioners should have leave to withdraw their petition. The house amended the report of the committee by substituting, for the conclusion thereof, the conclusion submitted by the minority; and the report, as amended, was agreed to.

The election of Joseph B. Nye, returned a member from the town of Plympton, was controverted by Thomas E. Loring and others, on the ground, that at the meeting for the election, which was on the day of the general election, November 11th, 1850, before proceeding to the balloting, at which the sitting member was elected, a motion, made by the first named petitioner, was seasonably made, not to send a representative, which motion the selectmen refused to put, but proceeded with the balloting, which terminated in the election of the member returned.

The committee on elections, to whom the case was referred, received the testimony of several witnesses, adduced by the parties as to the time when the motion not to send was made. The committee reported the same, in detail, together with the following:—

"The committee find, that the warrant for the town-meeting, held in Plympton, November 11th, 1850, was duly signed by the selectmen of said town, and that legal notice was given of the meeting; and that the only article in the warrant, in relation to the choice of a representative from said town, is as follows, to wit: 'Also, to bring in their votes for a representative to represent them in the general court, to be holden in Boston on the first Wednesday of January next.' A part of the record of said meeting is as follows, to wit: 'After that the selectmen declared the number of votes given for each person voted for, and that there was no choice of a representative

to said general court, a motion was made to adjourn the meeting, and it was voted not to adjourn. Then a motion was made to dissolve the meeting; but as the votes given in for governor, &c., had not yet been declared, and, of course, as a vote to dissolve the meeting would render the votes given in for governor, &c., illegal, the selectmen refused to call the vote. After the motion to dissolve the meeting was made, and the selectmen refused to call a vote to dissolve, a motion was made not to send a representative to the general court of Massachusetts; but as there was no article in the warrant for the meeting, that the subject matter thereof authorized such a vote, and, of course, such a vote would be illegal, the selectmen refused to call a vote not to send a representative, but called for the votes for a second time, voting for a representative to represent said town in the general court of Massachusetts, for the year 1851."

The committee concluded their report with the statement, that in the opinion of a majority of them, upon the evidence, the motion in question was seasonably and properly made, and should have been put by the selectmen, and not having been so put, the election subsequently effected was void.

This report, which was made on the 30th of January, was afterwards recommitted to the committee on elections, with instructions to report the conclusions of fact and the legal principles, on which they predicated their opinion above stated, that the election was void. They were also directed to receive any further evidence, which might be offered by either party, and were authorized to send for persons and papers.

In pursuance of the recommitment, the committee examined a great number of witnesses produced by the respective parties, whose testimony was reported at length. The committee then proceed as follows:—

"And, now, from this great mass of testimony, taken in connection with that given at the former hearing, the committee are directed, by the order of recommitment, 'to report the conclusions of fact and legal principles on which they ground their opinion.'

The principles of our institutions, and the form of government under which we live, unquestionably confer the privilege, and make it the duty of the respective towns in this commonwealth, to be represented in our legislative assemblies; and no slight cause in form, or even substance, ought to deprive a town of that privilege, when such town has manifested a desire and determination to be so represented. But on the other hand, it must be considered, that the efficacy of our laws, the preservation of our institutions, and the peace and quietness of the community, absolutely require that the selection of the law-makers should be subject to certain fixed and satisfactory regulations, which shall give a free, full and fair expression of the wishes of the voters. And the judges of our supreme judicial court, being called upon for that purpose, have given their opinion upon the construction of the constitution and laws, which should govern the presiding officers in town-meetings, in a case like the one now under consideration. In the 15th volume of Mass. Reports, page 537, (*ante*, 199,) they say, 'that a right to send a representative is a corporate right, vested in the several towns by the constitution, and can be exercised by them only in a corporate capacity; and it necessarily follows, that when a town is legally assembled for the purpose of electing a representative, if a vote pass not to send, the minority, dissenting, cannot legally proceed in the choice.'

Here the rule is clearly laid down, that towns have the constitutional right to vote not to send a representative; and the committee are of opinion, that for good and sound reasons this rule ought to be sacredly observed; and consequently it follows, irresistibly, that if a town have this constitutional right to vote not to send a representative, when a motion is regularly made not to send one, it is a legitimate motion, and it is the imperious duty of the presiding officer to entertain it, and to submit it to the decision of the meeting.

The decision aforesaid of our supreme judicial court is of long standing, and has been observed and conformed to by successive legislatures ever since its promulgation. And the committee cannot presume, that there will be any serious ob-

jection to it as a governing principle, by which we ought to be directed in deciding the present case.

The next question to be considered is, whether, when a motion is seasonably and properly made, not to send a representative, and the presiding officer refuses to put the motion, it vitiates and renders void an election subsequently made. The only difficulty which occurs to the committee, in the way of a ready answer to this question, is, that it is uncertain whether a majority of the legal voters are or are not in favor of the motion. And it can be said with some degree of plausibility, that inasmuch as the wishes of the majority have not been ascertained, and by a subsequent act a representative has been chosen, it must be presumed that a majority were in favor of sending. But it must be considered, that in reaching such a result, the constitutional rights of the qualified voters have been violated, in the presiding officer's refusing to submit to them a legitimate motion. And an act, based upon this violation, can hardly be considered legal. And again; it is very far from a certainty, that a majority were opposed to the motion, merely because, after being deprived of a constitutional right and privilege, enough of the voters tamely submitted, to carry out the illegal determination of the presiding officer. And the committee are of opinion, that if the presiding officer at the election, now under consideration, did wilfully refuse to put the motion not to send a representative, the same being seasonably and properly made, it was an illegal act, which vitiated and rendered void the election subsequently made.

They are supported and confirmed in this opinion by a series of decisions, heretofore made by the house of representatives in analogous cases; and would refer to the several cases of Westminster, (*ante*, page 32,) Nantucket and Sharon, (195,) Roxbury, (157,) Winslow, (201,) Southbridge, (215,) Boston, (221,) Charlestown, (226); and also the case of the town of Adams, (*ante*, 339,) where the chairman refused to put a motion to adjourn, and it was decided, that such a refusal vitiated an election subsequently made.[1]

[1] This is a mistake; the committee in that case reported against the election; but the house rejected the report.

The committee then proceeded to inquire, whether the motion of Mr. Loring was properly and seasonably made. There seems to be no doubt but that it was properly made so far as this; that it was made audibly, was heard by the chairman, and was seconded. And the great question, and substantially the only one, to be decided in this case, is, as the committee think, was the said motion made seasonably, at a proper time to be entertained and acted upon in the meeting?

The doubt, which existed in some minds at the meeting, as testified of, and which was suggested in this house, at the former debate upon this subject, whether such a motion could legally be made and entertained, after the meeting had been opened, and the voting had begun upon the first ballot, seems to the committee to be utterly unfounded. It is entirely contrary to the uniform practice in all our towns, and in many instances, would place town-meetings in a singular predicament. Most of the towns are desirous of being represented, and entertain sanguine expectations of being able to elect. They go into the election to accomplish the object, but after balloting a reasonable number of times, they become satisfied that it is impossible to concentrate a majority of voters upon any single candidate. Can it be contended that they are obliged, without hope, to continue the fruitless struggle *ad infinitum?* Besides, to dissolve the meeting would frequently destroy others of its objects. The committee do not feel inclined to waste any more time or words upon such a question. The material question is,—was Mr. Loring's motion not to send a representative made seasonably, in regard to the proceedings of the meeting, at the time it was made? Was it made before the voting had really and substantially commenced upon the second ballot, in which the sitting member was elected? If it was so made, then Mr. Nye was illegally elected. But if it was not made until that balloting had palpably and intentionally commenced, then the petitioners have not made out their case.

One thing appears very evident, and ought to be kept constantly in mind, throughout the whole investigation of the tes-

timony relative to this point, namely, that at the time of the meeting, and amongst all the discussion and controversy about this matter, then and there, not one word, nor, so far as appears from the testimony, one thought, was entertained, or uttered, that the motion was out of order, because the balloting had commenced. Other reasons were assigned, such as that it ought to have been made at the commencement of the meeting, and that it was not authorized by the wording of the warrant, &c. But this objection was not interposed. The record made by the town clerk on the spot, and at the moment, is of great importance, and is full of meaning upon this point. It reads as follows: 'A motion was made not to send a representative to the general court of Massachusetts, but as there was no article in the warrant for the meeting, that the subject matter thereof authorized such a vote, and of course such a vote would be illegal, the selectmen refused to call a vote not to send a representative; but called for the votes for a second time.' It can be hardly doubted, but that the reason assigned, and the only reason upon which the selectmen acted, is truly assigned in the record. And it is equally strange and unaccountable, if the second balloting had really and openly commenced before the motion was made, that so palpable and cogent a reason and ground for a refusal as this would afford had not been mentioned or even thought of.

The committee are fully aware, that the testimony above set forth is very conflicting upon the point of precedence between the commencement of the second balloting and Mr. Loring's motion; but they would suggest whether this state of affairs has not arisen in a great measure by mistakes in recollection. No doubt that all testify as they now really believe, but it is after a lapse of considerable time; when partizans have grown warm, and a new and unexpected point has arisen; when the mind, heated by party feeling, and rendered susceptible of receiving almost any bias, is called upon to recollect accurately the order of proceedings in one particular, which had not been called to the attention of any one before. In a case of controverted facts, where the testimony relates to trans-

actions which took place at a previous time, somewhat remote, great reliance ought to be placed upon the testimony of those, who, from their situation and interest in the matter, would be most likely to remember distinctly the order of events on the occasion. Now the chairman of the selectmen, who presided at that meeting, certainly ought to know what took place, and he states positively that Mr. Loring's motion was made, and heard by him, and talked about, before he received, or intended to receive, any votes on the second ballot; and he further states, that no one received or pretended to receive, with his knowledge or consent, any votes on that ballot besides himself; that if any votes got into the box, they got there without his knowledge or consent; because he did not intend to open the poll, or receive votes, until the question of Mr. Loring's motion was settled. And the decision and course of proceedings of the chairman of the selectmen is binding upon the other members of the board, unless dissented from at the time.[1]

Then again, Mr. Loring himself, who had been requested to make the motion, before the result of the first ballot was known, if it turned out to be no choice, and was waiting attentively for the declaration of the result, that he might immediately make his motion, would be very likely to remember how and when he made it. In connection with this, must be taken into consideration the testimony of Samuel Bradford, who had no desire to prevent the election of a representative, but says he wanted to send. He testifies that he was anxious to make a motion to adjourn, and meant to make it immediately after the declaration of no choice should be made; but that Mr. Loring was quicker than he could be, and succeeded in getting his motion made first. Now these witnesses, together with others similarly situated, being particularly interested in regard to the point of time when the motion was made, would be very likely to recollect it accurately.

It would be tedious and perhaps of little use, to go into a particular analysis of all the testimony bearing upon this question. A majority of the committee think that it strongly

[1] See the case of Charlestown, *ante*, 226.

preponderates in favor of the cause of the petitioners. And they firmly believe, that most if not all the testimony given upon the other side, and which apparently conflicts with such a conclusion, may be reconciled therewith, upon the presumption that Mr. Loring's motion, when first made and seconded, was not heard by those who give precedence to the commencement of the balloting, and that their attention to his motion was first called to it, when he urged or repeated it the second or third time.

The committee are of the further opinion, that if the chairman did call for votes immediately after the declaration of no choice, and thereupon and forthwith, Mr. Loring made his motion; it was the duty of the chairman to have suspended or revoked his call, so that a fair and reasonable opportunity could have been given for discussion, and the decision of the meeting thereon.[1]

A majority of the committee are therefore of opinion, that Mr. Loring's motion was a proper and legal motion, although not expressly, in so many words, written in the warrant; that it was made and seconded in due season; that a suitable and reasonable time ought to have been afforded for its discussion and decision, before proceeding to ballot the second time; that as the presiding officer at the meeting refused to entertain this motion, the subsequent proceedings in electing a representative were illegal and void, and that the sitting member from Plympton is not entitled to a seat in this house."

Two members of the committee, (Messrs. *Schouler* and *Story*,) dissented from the conclusions both of fact and law stated in the report, and presented their views thereon as follows:—

"The evidence in this case is exceedingly voluminous and contradictory. It is difficult to say, exactly, what it proves or disproves, in regard to the points at issue. The undersigned will, however, endeavor to state, as clearly and concisely as may be, what appears to their minds to be its fair result.

The certificate of the member is good *prima facie* evidence,

[1] See the case of Charlestown, *ante*, 226, and the case of Boston, 221, to this point.

that he is entitled to his seat, and the burden is on the petitioners to show, affirmatively, that he is not; this presumption of law, in favor of the certificate, stands for evidence for the sitting member at every point of the testimony, nothing having been shown to change the burden of proof in any particular. It must be conceded, then, in the absence of proof to the contrary, that the chairman of the selectmen, with the concurrence of his colleagues, was justified by the usage of the town, and the presumed assent of the voters, in holding out the ballot-box, and calling for votes, on the second ballot, without any previous vote of the meeting to proceed, and that he did this fairly and honestly, in the ordinary course of business, and with a single eye to his duty. It is shown by the testimony of the principal petitioner, Mr. Loring, who made the motion not to send, which has occasioned the petition, that that motion was made immediately after the chairman called for votes; and it appears to the undersigned, to be abundantly proved, that the votes of Mr. E. S. Wright, and Mr. T. D. Ellis, were put in instantly upon the making of this call, and before the motion of Mr. Loring had fairly reached the apprehension of the selectmen. This fact is testified to by the two voters themselves, by Mr. Bisbee, the selectman, who says he checked their names; by Mr. Charles B. Wright, who says he tried to vote immediately after them, and was prevented by the chairman, (who held the box out of his reach, and said there was a motion to adjourn,) and by several bystanders, and there seems to the undersigned, to be no ground whatever for imagining, that these votes could have been put in after the decision of the selectmen, that Mr. Loring's motion was out of order. The fact, that many of those present did not see the votes deposited, can hardly be said to weigh against such positive testimony as this. The undersigned submit the foregoing, as in their judgment, the only theory upon which the testimony, which was doubtless honestly given, and is wholly unimpeached, can be made in any degree consistent with itself; and they add, that even if this theory be not supposed to be absolutely made out, it certainly is not disproved by the testimony; which latter re-

sult is as good for the purposes of the argument, as any; it being necessary for the petitioners to disprove it beyond a reasonable doubt. Though the evidence conflicts considerably upon the question of the order of motions, and the disposition made of them after the call for the second ballot; it seems to the undersigned, that a motion to adjourn to the next day came after the motion of Mr. Loring, and was put and negatived; that a motion to dissolve was then made, and the affirmative side of it only was put; and that then Mr. Loring's motion was first regularly noticed by the selectmen, and, after discussion among themselves, and some remarks from some of the voters, ruled out of order; whereupon several voters, much less, however, than a majority, left the meeting, and then the balloting proceeded, at which Mr. Nye was elected.

It thus appears to the undersigned, that the petitioners have wholly failed to make out their case. If it shall not appear to the house, that the holding out of the box, accompanied by a call for votes, was of itself sufficient to make a subsequent motion improper, (that call, so accompanied, being in the nature of a full question stated, like a question to be taken by yeas and nays, of which the affirmative and negative are simultaneously put, and after which, no motion is in order,) yet the deposit of the two votes, or of a single vote, though co-instantaneous with the motion not to send, settles the question in favor of the sitting member, as the right of one voter to put in his vote, after the chairman's call, was certainly as good as that of another to make a motion. The chairman of the selectmen has no recollection of admitting these two votes; he appears to have been in a state of great agitation at the time; but it appears that while he had not yet noticed Mr. Loring's motion, the other two selectmen, at least, had noticed the two voters, and allowed the votes to go in. Mr. Bumpus, the third selectman, confirms the testimony of Mr. Bisbee and the rest, as to the vote of Mr. E. S. Wright, and thus it certainly appears in the highest degree probable, that that gentleman's vote went into the box, while Mr. Loring was yet speaking, and the vote of Mr. Ellis immediately afterwards, before

the selectmen could have taken notice of the motion. It was clearly an irregularity, to put the motion to adjourn, and clearly right, not to put the motion to dissolve, whether the balloting had commenced or not; because the law distinctly requires the selectmen to seal up the record of certain votes, previously thrown at the meeting, and then not sealed up, before any adjournment, and a motion to violate the law is necessarily out of order.

It appears obvious, that no actual injury has been suffered by this refusal of the selectmen, to put the question on the motion not to send. If those who desired to vote in the affirmative were the majority, they could gain their object with but slight trouble by depositing their votes; if a minority, they would lose it in any event. If any of them choose to retire from the meeting in wrath, or congratulating themselves upon the strength of their technical ground, they must take the consequences of their error, whatever they may be. It will hardly be maintained, that an error of the selectmen is to be magnified by the views which a portion of the voters may choose to take of it, and by the steps they adopt in consequence. A voter, certainly, ought to have no more weight out of the meeting than in it, and it cannot be held that fifty voters, by leaving the meeting, can nullify the acts of a hundred who remain.

The undersigned have no doubt, that if their view of the result of the evidence is taken by the house, the sitting member will be confirmed in his seat. But they do not leave the case here. On the contrary, they are prepared to maintain, that upon the very state of facts set up by the petitioners, the member has a right to his seat.

They will admit, for the further purposes of this argument, that the motion not to send was made and seconded at a proper time, and ruled out of order by the selectmen. And they contend, that even upon this hypothesis, to deprive the member of his seat would be contrary to the clear fundamental policy of the commonwealth, and to the weight of established precedent and law.

As the argument would be similar, upon the ground that

sufficient time was not given to make the motion (in the absence of fraud), to the argument upon the question above stated, that point is here dismissed.

There is no imputation of fraud in this case. The selectment were acting fairly, and endeavoring to do their duty. The question, then, is this: Is the neglect or refusal to put a motion not to send a representative, regularly made and seconded, sufficient, of itself, to invalidate an election subsequently made? The fact that the chairman gave an unsound reason for not putting the motion is of no consequence. The question is not of what he said or did not say, but of what he did, or refused to do.

The fault, then, for which the town is said to deserve to lose its representative, was an error of judgment on the part of the chairman of the meeting, on a question of parliamentary law, applicable to his duty at the time. Now, the undersigned think it clear, that the house, in its capacity of a court, which settles the law relating to cases of elections, is bound to lay down for the towns certain clear and fundamental principles; not to frame a nice and technical system, but merely to inculcate those rules of common law, or, what is the same, of experienced common sense, which underlie the whole law respecting public meetings, and which have obtained with the Anglo-Saxon race, from the earliest times. These principles are few, and of universal application and recognized utility. The first is, that there must be a presiding officer; the second, that there must be a recording officer. These are already provided for in the case of town-meetings, by statute. Next in order come these three; that only one thing can be done at one time; that whatever is proposed to the meeting for its action must be proposed through the chair; and that the meeting must control the chair. There is nothing in these too nice for ordinary use, and these, it seems to the undersigned, ought to be recognized by the house, as being, what in fact they are, a part of the common law. To apply these principles to the present case; the chair, as is admitted, for the sake of the argument, ruled incorrectly on the point of order; the voter who made the motion had the right

to appeal to the meeting, and was bound to do so, for this, among many more obvious reasons, that the chair was promulgating for law what was not law, and misleading the general mind. The chair necessarily ruled hastily, and if an appeal had been taken, the wisdom of the meeting, expressed in debate, would probably have enabled the chair to correct its error, and to give a deliberate and sound opinion, after argument. If otherwise, the meeting would doubtless have overruled the chair, or, if it did not, it would be justly responsible for the error. The voter in this case, not having appealed, has waived his right, and it does not lie in his mouth, nor in that of those who joined in this legal acquiescence, to complain of the consequences of his own error. It may be said, that it will not do to adopt any, even the easiest and most fundamental principles of parliamentary law, for the government of town-meetings. Will the house then invalidate the town's elective franchise for a year, and that a most important year, because the officers of the town have ruled incorrectly on a point of parliamentary law, so abstruse, that the opinion of the justices of our highest court was needed to inform the house of representatives, that its previous judgment, which had been identical with that of these selectmen, had been erroneous? Will the house hold a presiding selectman, or a board of selectmen, to know accurately, and to decide correctly, at ten minutes' notice, in the confusion of a town-meeting, a point of law of that sort, when the decisions upon it date back at least thirty years, and are only to be found in a rare book, now long out of print, (the Reports of Contested Elections,[1]) and with which few, even of the class of statesmen or that of lawyers, are in any degree familiar? The undersigned humbly but very confidently answer these questions in the negative. It may be urged, that the practice of voting not to send is familiar to those towns, which send less often than once in every year; but then the question, whether the town will send this year or the next, is a totally distinct one from the question, whether they will neglect their clear duty, to send at a

[1] Reprinted in the present volume.

time when, (as in this case,) they may send without prejudice to their rights or interests, in any subsequent year.

It may be further urged, that the selectmen acting at elections are officers of the law, and, so in certain particulars, not under the control of the meetings over which they preside. If this be not so, then the previous argument applies; if it be so, how can it be held that the towns should suffer for their error? If the fault be serious, the selectmen should be punished in their own persons. If there be now no law to punish them, a law can be made for future offenders in the like kind, and it is not the fault of the town of Plympton, that it does not now exist.

It appears to the undersigned, also, that it is the duty of the house to encourage in the several towns a candid, liberal and earnest mode of transacting their business at elections,—not a small and hair-splitting method,—and where a minority is found to aim at carrying its point by a trick of special pleading, rather than by an honest endeavor to convince and convert, or to out-vote its opponents, that course certainly is not to be favored.

It further appears very clearly, that the object of the constitution is, that the people shall be represented in the house, not that they shall vote not to send. This point might be labored at great length, but the argument is too obvious, and has been too often reiterated, to permit the undersigned to do more than to allude to it, so far as it bears on the question of the true policy of the house in the premises.

The last point, to which attention is desired, is this, that the weight of precedent is in favor of the sitting member.

The fundamental law on the subject is, of course, the constitution. In that instrument, chapter 1, section 3, article 2, it is provided, that the towns may send representatives to the general court, in certain modes and under certain limitations, and further, that the house of representatives shall have power, from time to time, to impose fines upon such towns as shall neglect to choose and return members to the same.

These provisions, of course, import at once a privilege and a

duty, and upon the principles of law as generally understood, it would seem that a motion not to send a representative, being a motion that a town deliberately resolve to neglect its plain duty under the constitution, would be out of order, and that an affirmative vote upon such motion would be illegal and void. And this was the original construction adopted by the house.[1] But some years afterwards, (Feb. 16, 1811,) in answer to an order of the house, requiring an opinion on a wholly different subject, the justices of the supreme judicial court say, merely as a passing remark, not particularly connected even with the argument on the question before them, as follows:—

'The right of sending representatives is corporate, vested in the town, and the right of choosing them is personal, vested in the legal voters. Because the right of sending a representative is corporate, if the town, by a legal corporate act, vote not to send a representative, none can be legally chosen by a minority dissenting from that vote. This corporate right is also a corporate duty, for the neglect of which, a fine may be assessed and levied upon all the inhabitants liable to pay public taxes.'[2]

Subsequently to this, the case of Roxbury, 1813–14,[3] was decided, in which the refusal to put a motion not to send, or its equivalent, was only one of many substantial grounds on which the election was invalidated. The committee, in their report on this case, speak of 'a decision of the supreme judicial court' on this subject, (as distinguished from the practice of the house,) as 'fixing the established law of the land.' They doubtless refer to what has just been quoted, which is a mere passing remark, and not a 'decision,' nor even an 'opinion.' And the undersigned will say here, with reference to the opinions hereinafter quoted, that it requires no lucubrations of twenty years' duration, to know that an opinion of the justices, in answer to a question from the house, however delib-

[1] Westminster, 1790–1, *ante*, 32; Topsham, 1802–3, *ante*, 43.

In the Westminster case, the memorialists say:—"The principle held out and acted upon, that every town has a right to vote they will not send a member to the general court, strikes at the very nerves of the constitution, and throws the people into anarchy at once."

[2] Ante, 120. [3] Ante, 157.

erately given, and however responsive to the question, is only the opinion of so many able lawyers, given, too, without their having heard arguments, and is in no respect law. It is not 'a decision of the supreme judicial court.' It is a mere 'opinion,' and the undersigned deem it at least questionable policy, on the part of the house asking the question, to shift from its own shoulders, itself being the legitimate expounder of the constitution, the burden of making the exposition. It is never well to seek to divide responsibility without absolute necessity. And certainly, there was no such necessity here. The house was perfectly competent to decide the question. It contained, as always, men of great ability. The question related to its own privileges. It has always, since the famous 'Speaker Thorpe's Case,' in the reign of Henry VI.,[1]—in the country

[1] Thomas Thorpe, who was speaker of the house of commons, in the 31 of H. VI., was sued by Richard, duke of York, during the recess of parliament, in the exchequer. The plaintiff obtained a judgment and execution, upon which Thorpe was arrested and committed to the Fleet prison. When the parliament met, after the recess, the whole house of commons presented a petition to the lords, for the enlargement of their speaker. The lords, thereupon, as appears by the record, "not intending to impeach or hurt the liberties and privileges of them that were commons for the said communalities of this land to this present parliament, but legally, after the course of law, to minister justice, and to have knowledge what the law will weigh in that behalf, opened and declared to the justices the premises; and asked of them, whether the said Thomas ought to be delivered from prison, by force and virtue of the privilege of parliament or not. To the which question, the chief justice, in the name of all the justices, after sad communication, and mature deliberation, had among them, answered and said:—That they ought not to answer to that question; for it hath not been used aforetime, that the justices should in anywise determine the privilege of this high court of parliament; for it is so high and mighty in this nature, that it may make law, and that that is law, it may make no law; and the determination and knowledge of that privilege belongeth to the lords of the parliament, and not to the justices: But, as for the declaration of proceeding in the lower courts, in such cases, as writs of *supersedeas* of privileges of parliament be brought and delivered, the said chief justice said, there be many and divers *supersedeas* of privilege of parliament brought into the courts; but there is no general *supersedeas* brought to surcease all processes; for, if there should be, it should seem that this high court of parliament that ministreth all justice and equity, should lett the process of the common law; and so it should put the parties complainant without any remedy, for so much as actions at common law be not determined in this high court of parliament; and if any person, that is a member of this high court of parliament, be arrested in such cases as be not for treason or felony, or surety of the peace, or for a condemnation had before the parliament, it is used, that all such persons should be released of such arrests, and make an attorney, so that they may have their freedom and liberty freely to intend upon the parliament." The lords, upon this answer, resolved that Thorpe, "according to the law," should still remain in prison for the cause stated; "the privilege of parliament, or that the same Thomas was speaker of the parliament, notwithstanding;"

whence we derive those principles of parliamentary law, which have, in a high degree, made England and America what they are,—been thought improper to ask the opinions of the justices on points of privilege, and the consequences of having asked and received this opinion are in no respect valuable.

On the contrary, those consequences are, that, whether the house, which first asked the opinion, supposed that, as usual, the justices of that court meant something more than they said (whereas in fact they had gone to the very outmost verge of construction); and acted upon the ground, that the opinion, that a town had a right to vote not to send, implied that that right ought to be exercised and encouraged; or whether it thought that temporary grounds of expediency justified its course, it certainly proceeded to offer a premium upon that motion, greater than was allowed to any other; and the result is, that the decisions upon this point, blazing with their own singularity, and with the borrowed lustre of the opinions of the justices, stand out like beacons in the sea of law; but in the opinion of the undersigned, it is better to sail away from them, than towards them. There are dangerous rocks where they stand.

But to retrace the argument. Next to the Roxbury case, came that of Nantucket, in 1814–15, (*ante*, 180,) where there were other substantial circumstances also to govern the decision of the house, besides the neglect of the motion not to send, and among those circumstances was the reading of the riot act, and the dispersion of the meeting by the sheriff.

In the next year, were the twin cases of Nantucket and Sharon, (*ante*, 195,) pending the decision upon which, the opinion of the justices was asked upon the question, whether a town could legally vote not to send a representative, so that that vote should bind a dissenting minority. The justices, in

and that the commons should be commanded, in the king's name, to proceed to the election of another speaker, "with all goodly haste and speed."

The reasons assigned by the judges, for declining to express an opinion on the question of privilege, though probably true at that time and long afterwards, namely, that privilege is not defined by law, but is whatever the house, in their discretion, may choose to make it, would not be generally admitted, at the present day, in England, and certainly does not, if it ever did, exist in this country.

their reply,[1] referred to the above quoted passing remark of their predecessors, and confirmed the doctrine therein conveyed; laying some stress on the fact, that the house was not absolutely required to impose the fine in question. This opinion, though, of course, it received from the undersigned all that high respect which was due to its source, yet excited in their minds some surprise, as it clearly goes to the point of saying, that a town has a right to neglect its duty deliberately, if it is willing to incur the risk of a fine.

This surprise was somewhat lessened by the perusal of an opinion of Mr. Justice Preble, of Maine,[2] given at its request, to the house of representatives of that state, in 1826, on a question of a similar character to the one under consideration, and which the undersigned quote, as the opinion of a distinguished contemporaneous lawyer and judge, who may well be supposed to have understood whereof he spoke. He says, speaking of the *dictum* of 1811: 'It was a construction, operating as a check to a growing evil, the increasing number of representatives.' This seems to show the ground on which the justices, as well as the house, felt justified in their opinions on this point. This opinion of Mr. Justice Preble, the undersigned think it not irrelevant here to state, was a dissentient opinion, concluding that under the constitution of Maine, a town had no right to vote not to send a representative; and though the constitution of Maine differs slightly from our own, (among other differences, it has no provision for a fine upon towns not sending); and his opinion is predicated upon the ground, that the word 'corporate' is studiously excluded from the former, and that of consequence, the right to send a representative belongs to the individual voters; yet the fact that the legislature of that state adopted his opinion, and rejected that of his two associates, shows that their view of public policy sustains the ground taken by the undersigned.

Asking pardon for this digression, the undersigned proceed to say, that the case of Nantucket and Sharon was decided

[1] Ante, 198. [2] 6 Greenleaf's Reps. App. 496.

against the sitting members, and that similar decisions were made in the Boston case in 1818–19, (*ante*, 221,) and in the Charlestown case in 1819–20, (*ante*, 226); and these three cases are those on which, and on which alone, it is believed, that the case of the petitioners rests. It was probably thought advisable by the house, at that time, when its numbers were growing formidable even to itself, to promulgate this new doctrine; and having done so in the case of these two small towns, it seemed highly expedient to do the same with the two large ones; particularly as they were at the very base of the capitol, and for that and other obvious reasons, were in an especial manner bound to recognize the first decisions. It is not supposed, that these cases were intended as precedents, but that they merely arose out of what was deemed a temporary expediency. The justices, in their opinion in 1815, lay great stress on the fact, that the towns were obliged to pay their own representatives, and that therefore the minority could not lay that burthen on the town; and they allude to the fact, that those qualified to vote in town affairs, and who could vote on the question of whether a representative should be sent, were a different body from those who were qualified to vote in the election of the representative. These grounds for their opinion have ceased to exist.

The house, again, may well be supposed to have acted with reference to the desired diminution of its own members. The evil thus sought to be corrected has also ceased, though the undersigned willingly admit, that this last argument might be pressed at a more favorable time than the present.

It may also be remarked, that in all the decisions on this point, the refusal to put the motion occurred at the opening of the meeting, and it would be going a step beyond any of them to unseat the member in this case. If this voting not to send has been deemed a valuable medicine, it has never been held, that the selectmen were bound to give their patients more than one opportunity to ask for it on the same day. But the undersigned gladly remark, that the decisions on this side stop here in 1819–20. There is no new law on the subject on this side.

On the other hand, in the convention of 1820–21, for revising the constitution, the same question arose and was decided in the opposite way.[1] There it appeared that the town of Charlestown had, at the opening of their meeting for the choice of delegates to that convention, voted to send six; that only five were chosen at the first balloting; that a motion was then made, to reconsider the first vote so far as the sixth was concerned, which the selectmen refused to put; and that the balloting was then resumed, and resulted in the choice of the Hon. Leonard M. Parker. Upon this state of facts, the convention voted that the election was valid, and Mr. Parker held his seat. Though the form of the motion in this case is slightly different from that in the cases on the other side, yet the meaning is identical in all; and though the case is not strictly an authority, yet a decision of the most illustrious sons of the commonwealth, on a question where all those cases were quoted, is entitled to, and will doubtless receive, its due weight as an opinion. It is not imagined that any feeling of *esprit du corps*, or pride of opinion, on the part of any member of this house, will prevent it from weighing as much as a similar decision of the same men assembled as a house of representatives.

The undersigned consider the question now standing as a new one, with decisions on both sides, some of the earlier and the last on their side, the intermediate on the other. But they find, that in the case of the Adams election in 1836, (*ante*, 339,) a motion was regularly made, and seconded, (under circumstances, too, which rendered it reasonable,) to adjourn to the next day; that the selectmen refused to put it; that the committee on elections of the house, on the authority, doubtless, of the decisions above cited, reported the election void; and that the house, though of a political complexion different from that of the two members, rejected the report, and took no further action upon the subject; which was precisely equivalent to a vote that the members were entitled to their seats. There is some ground for supposing, that the zeal of the minority of

[1] Journal of the Constitutional Convention, page 36.

the voters in that case led them to behave somewhat factiously in the meeting, and afterwards in retiring from it nearly unanimously; but the case goes to this point, that where the selectmen mean fairly and honestly, a mistake of their duty in regard to the putting of a particular motion, regularly made and seconded, is not sufficient to invalidate the election subsequently made on the same day. This case, in the opinion of the undersigned, entirely covers the present, unless the house is going to hold, at this late day, when the reasons for those old decisions have entirely failed, what was never held in the palmy days of those decisions, that this motion, in derogation of duty, is entitled to greater consideration, than a motion tending to forward the public business, or indeed than any other motion whatever.

It is a customary remark among uninformed persons, that the decisions of the house, upon questions of elections, are loose and irregular. It will be found upon examination more correct to say, that they have been regularly lenient.

In reviewing the course of decisions, upon cases in any degree analogous to the present, from the adoption of the constitution to the year 1843, (farther than which, the undersigned have not extended this particular inquiry,) only *ten* elections have been held void, in cases controverted on the ground of irregular conduct of selectmen. Among those which have been sustained, are found repeated cases where selectmen have violated most important parliamentary rules; and even the most express and valuable provisions of statutes, of remote as well as recent date, with reference to the time of violation; and the conclusion therefore presents itself, that unless the refusal to put this particular motion, that the town neglect its duty, be held a more heinous offence than any other which it is within the capacity of a selectman to commit, the member from Plympton is entitled to his seat, even upon the state of facts assumed to exist by the petitioners themselves.

If it be said, that this part of the defence stands upon technical grounds, it is replied, that the point presented by the petitioners is purely technical. A legal argument upon a point of

law should be answered by a legal argument bearing upon the same point.

Finally, the undersigned repeat, that if their view of the facts in the case be deemed the correct one, or if it be not affirmatively shown to be incorrect, so as to rebut the presumption of law, then it must be admitted that the election was valid. If, on the other hand, the view of the facts taken by the petitioners be deemed and taken to be established beyond a reasonable doubt, even then, to hold the election void would be, in their deliberate judgment, to violate the plainest principles of public policy, and to re-establish the authority of unfortunate precedents, the reasons for making which have ceased to exist, and which may fairly be considered as wholly overthrown by subsequent decisions.

The undersigned can therefore only arrive at this conclusion, that the member from Plympton is entitled to his seat, and that the petitioners have leave to withdraw their petition."

The report was amended, by striking out the concluding paragraph, and substituting therefor the conclusion stated by the minority; and the report, as amended, being agreed to,[1] it was accordingly—

Resolved, That the member returned from Plympton is entitled to his seat, and that the petitioners have leave to withdraw their petition.

[1] 73 J. H. 549.

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, IN ANSWER TO CERTAIN QUESTIONS, TOUCHING THE ALTERATION OF THE BOUNDARY LINES OF COUNTIES AND TOWNS BY THE LEGISLATURE.

The legislature have constitutional power to change the boundary lines of counties, for all purposes for which counties are established, except that of constituting senatorial districts.

The legislature have constitutional power to change the boundary lines of towns, for all purposes other than those incident to the election of senators and representatives; but, in changing the boundary lines of towns, by annexing a part of one town to another, or by constituting a new town from one or more existing towns, the legislature may reserve and secure to the inhabitants residing on such portion or portions, a right to vote in the election of representatives, with the town or towns from which such portions are taken, until the expiration of the next preceding apportionment of representatives.

"THE undersigned, justices of the supreme judicial court, having considered the several questions proposed to them by the senate, conformably to their request, thereupon respectfully submit the following opinion:—

These questions are stated as follows:

'1. Has the legislature constitutional power to change the boundary lines of the counties, as now established in this commonwealth?

2. Has the legislature constitutional power to change the boundary lines of towns, when by so doing, they must change the lines of counties, which are established as permanent senatorial districts?

3. Does the territory of each town in the commonwealth, as existing at the time of the last apportionment of representatives by the governor and council, constitute, until the next apportionment, a permanent representative district; or has the legislature power to annex a portion of one town to another, so that the inhabitants residing on such portion shall have a right to vote, in the election of representatives to the general court, with the inhabitants of the town to which such portion is annexed?'

Before proceeding to a direct answer, the undersigned beg

leave to refer to an opinion submitted to the legislature, March 29, 1839, which appears to us to have a strong bearing upon some of the subjects embraced in the foregoing questions. Two only of the present justices joined in the expression of that opinion, the other three having been since appointed; but all the undersigned, having now examined that opinion, see no reason to alter or change it, but on the contrary concur in and confirm the same, so far as it applies to the questions now presented.

In answer to the first question, we are of opinion, that the legislature have full constitutional power to change the boundary lines of counties, as now established, by transferring one entire town from one county to another, or by erecting a new county, by setting off any number of entire towns, from one, or from several counties, and forming them into a new county, for all purposes of civil and criminal jurisdiction of courts, and for all other purposes, for which counties are by law established in this commonwealth, except that of constituting senatorial districts, as hereinafter explained. We have confined this answer to the case of transferring an entire town, because we suppose this fully answers the question intended to be put by the senate. The difficulties both as to the jurisdiction of courts, and the rights, duties and obligations of individuals, as inhabitants of a county, which would arise from an attempt to include part of a town in one county and part in another, for general county purposes, would be so great and so obvious, that we have supposed it was not contemplated by the senate, and therefore we have not thought it necessary to form or express any opinion upon this question.

2. In answer to the second question, the undersigned are of opinion, that the legislature have constitutional power to change the boundary lines of towns, when, in their judgment, the public good requires it, for all purposes, other than those incident to the election of senators and representatives in the general court, although by so doing they must change the lines of counties. To prevent any misconstruction of this opinion, it will be necessary to state the grounds of it somewhat at large.

The legislature have full power under their general authority to pass all useful and wholesome laws, to change the boundaries of towns, to any extent, where it is not limited and restrained by constitutional provisions. By an amendment of the constitution, set forth in a resolve of 10th March, 1840 c. 16, adopted by vote of the people, and declared by the proclamation of the governor, issued 17th April, 1840, to be in force as a part of the constitution of the commonwealth, from and after that date, it is declared, as follows: 'The several senatorial districts now existing shall be permanent.' In order to perceive the full effect of this constitutional provision, it is necessary to look at the law as it then stood, in order to ascertain the force and effect of the words 'now existing.' Prior to this amendment, the limits of senatorial districts, and the apportionment of senators amongst them, were fixed by law. By the Rev. Stats. c. 5, § 2, the several counties were made senatorial districts, except that Nantucket and Dukes counties were united to form one district. This law was in force when the amendment was adopted, and the effect of the amendment was, to make the counties, with their then actual limits, permanent senatorial districts. That which is made permanent by the constitution cannot be changed by law. But it is not incident to the appropriate character of a county, to choose senators; but the territory of counties seems to have been an easy, convenient, and well marked designation of the limits to constitute the lines of senatorial districts, and for that reason was adopted. Counties then became senatorial districts, not because there is any necessary or legal identity or coincidence between counties and senatorial districts, but because the territories composing counties, on the 17th of April, 1840, were, by force of the constitutional amendment, made permanent senatorial districts.

But in exercising this power, it will be necessary for the legislature carefully to provide, that in changing the line of the county such change, whilst it shall effectually set off the territory from one county and annex it to the other, so far as it concerns the jurisdiction of courts, and for all proper county

purposes, shall not alter the relations of the inhabitants of such territory, as members of the senatorial district to which they belong; but on the contrary, to provide, that for the purpose of voting for senators, all the persons residing, or who may come to reside, on the territory thus transferred, shall be taken and deemed to be inhabitants of the town from which such territory was set off, and shall have a right to vote for senators therein, in the same manner, as if such territory had not been set off.

Such a change of county lines, without a change of the limits of senatorial districts, whilst these must be permanent and unchangeable, until the constitution in this respect shall be altered, would be manifestly attended with great inconvenience, so great indeed, that the legislature would not probably adopt it, except upon urgent considerations of public expediency; but these inconveniences and difficulties do not appear to us, to amount to a legal prohibition to the exercise of this power by the legislature, should any public exigency require it. We have, therefore, felt bound to answer the question proposed, affirmatively, that in our opinion, the legislature have the constitutional power to change the lines of towns lying in different counties, although they thereby change the lines of counties, provided it is done under such restrictions and limitations, that it shall not change the senatorial districts, designated by county lines, as they stood and were established in April, 1840, and made permanent by the amendment then adopted, nor essentially interfere with the rights of all persons within such districts, to vote in the election of senators.

3. The third question, we think, is substantially answered, by the opinion hereinbefore referred to, given in March, 1839, and by the considerations expressed in the answer to the next preceding question. The amendment of the constitution, adopted in 1840, provides for the apportionment of representatives amongst the several towns of the commonwealth, adopting with some alterations the principles of an earlier amendment, upon which the opinion before referred to was

that the several petitioners each received a majority of the whole number of ballots given in; that there were informalities and errors, in making up the record and return in the fourth ward, which the mayor and aldermen did not consider themselves authorized to correct, upon receiving an amended return from the ward officers,[1] but thereupon adjudged that no election had been effected, and ordered a new election.

The irregularity in the return was, that the ward officers of the fourth ward, having recorded the whole number of votes, instead of the whole number of ballots, for senators and representatives, made their return accordingly to the mayor and aldermen.

The whole number of votes for governor, as recorded by the ward officers, and returned by them to the mayor and aldermen, was eight hundred and eleven; and for lieutenant-governor, eight hundred and six; the whole number of votes for senators, *four thousand seven hundred and sixty-nine*, of which the highest candidate voted for received four hundred and fifty; and the whole number for representatives, *eight thousand and thirty-eight*, of which the highest candidate voted for received four hundred and sixty-one. This return was dated and made on the day of election. On the next day, the 11th, the ward officers signed and transmitted a paper, of which the following is a copy, to the mayor and aldermen:—

"We, the undersigned, the warden, inspectors and clerk of ward number four, in the city of Lowell, find on examination two errors made in our record of the whole number of ballots cast in said ward, at the election held on the tenth of November instant, to wit.:—In the return of the whole number of ballots cast for senators for the

[1] The refusal of the mayor and aldermen, to correct the return from ward four by the amended return, gave rise to an indictment against them, which was found and tried at the February term, 1852, of the court of common pleas in the county of Middlesex. A statement of the case, with the opinion of the court thereon, will be found at the end of the volume.

By the statute of 1852, c. 209, § 1, (passed May 12, 1852,) it is now made the duty of the mayor and aldermen and clerk of any city to examine, as soon as may be after any election therein, the returns thereof by the ward officers; "and if any manifest error shall appear therein, in the form of the return," they are to give notice thereof forthwith to the ward officers, who are then immediately to make a new and additional return, under oath, in conformity to the truth of the case. Such amended return may also be made by the ward officers without any notice; and, in either case, it is to be received by the mayor and aldermen, and examined, and made part of the return of the election.

county of Middlesex, being erroneously returned forty-seven hundred and sixty-nine ballots, also in our return of the whole number of ballots cast in said ward for representatives being erroneously returned eight thousand and thirty-eight ballots.

We therefore correct these two numbers, and return the whole number of ballots for senators to the general court was eight hundred and eleven (811).

The whole number of ballots for representatives to the general court was eight hundred and eleven (811).

This correction being in accordance with the truth, and the rest of the original return being correct.

WILLARD MINOT, Warden.
OTIS ALLEN,
JOSEPH S. GREEN, } Inspectors.
LEWIS CUTTING,

ALANSON NICHOLS, Clerk."

The city clerk certified, on this paper, that he received and placed the same on file in his office on the 11th of November, 1851, at half-past two in the afternoon, and that on the same day it was presented by him to the mayor and aldermen.

If the whole number of votes, stated in the original return from the fourth ward, was properly to be included in making up the whole number given in at the election, no person would have the requisite number, and consequently there would be no choice. If the whole number was to be estimated, according to the statement in the amended return from ward four, the petitioners would be elected.

The following is that part of the charter of the city of Lowell, (St. 1836, c. 128, § 22,) which relates to the subject of this case:—

"All elections for governor, lieutenant-governor, senators, county treasurer, representatives, representatives to congress, and all other officers who are to be chosen and voted for by the people, shall be held at meetings of the citizens, qualified to vote in such elections, in their respective wards, at the time fixed by law for those elections respectively. And at such meetings, all the votes given in being sorted, counted and declared by the warden and inspectors of elections, shall be recorded at large in open ward meeting by the clerk, and in making such declaration and record, the whole number of votes given in shall be distinctly stated, together with the name of every person voted for, and the number of votes given for each person; such numbers to be expressed in words at length. And a transcript of such record, certified and authenticated by the warden, clerk, and a majority of the inspectors of elections for each ward, shall forthwith be transmitted or delivered by such ward clerk to the city clerk, and the city clerk shall enter such returns, or a plain and intelligible abstract of them, as they are successively received, upon the journal of the proceedings of the mayor and aldermen, or some other book to be kept for that purpose. And the mayor and aldermen shall meet together, within two days after every such election, and examine and compare all such returns, and thereupon make out a certificate of the result of such

election, to be signed by a majority of the board of aldermen, and also by the city clerk, which shall be transmitted, delivered, or returned, in the same manner as similar returns are by law required to be made by the selectmen of towns; and such certificates and returns shall have the same force and effect, in all respects, as like returns of similar elections made by the selectmen of towns."

The committee were unanimously of opinion, that the several petitioners each received a legal majority of the whole number of votes given in at the election, and were entitled to seats in the house. This report was agreed to,[1] and the petitioners were thereupon admitted to be qualified and took their seats.

CASE OF JAMES TOWNSEND AND OTHERS, PETITIONERS.

The clerk of one of the wards in the city of L. having made up his record, of the votes given in at an election for representatives, at his own counting-room, after the votes had been declared and the meeting had been dissolved, a transcript of the record thus made was duly signed by the ward officers and sent to the city clerk; and a mistake having been subsequently discovered in the record by the ward officers, they amended it, and sent a transcript of the amended record to the city clerk, by whom the same was laid before the mayor and aldermen, who did not consider themselves authorized to act upon it; it was held, that those persons, who received a majority of the votes in *all* the wards, and not those, who received a majority in the *other* wards only, were duly elected.

The committee on elections, to whom was referred a memorial of James Townsend and six others, praying to be admitted as members, on the ground, that they had been duly elected, and ought to have been returned, as such, from the city of Lowell, reported thereon, on the 18th of February, as follows:—

"The memorialists allege, that in five of the wards of the city of Lowell, at the election on the second Monday of November last, the proceedings were regularly conducted and legal, and that in the other ward (ward 4) the proceedings were illegal, irregular and void; and that in the five wards whose proceedings were legal, the memorialists each had a majority of the votes cast, and are entitled to their seats as members of this house.

The facts proved before the committee, are these:—

[1] 74 J. H. 152.

The meetings in the several wards were properly called and conducted, till after the close of the poll, and the sorting, counting and declaring of the votes.

After the declaration in ward four, the ward clerk commenced to make up his record, but it being cold and the ward room badly lighted, the meeting was dissolved, and he took his memoranda of the counts, from which the declaration had been made, and the ward book, and went to his counting-room, where, after supper, the remainder of the record was made up, and a transcript thereof signed, and sent to the city clerk; from the phraseology of the city charter, some of the ward officers in ward four thought it their duty, to record and return the whole number of votes, instead of the whole number of ballots, for senators and representatives, and did so make up their record and return; and subsequently, finding they had made a mistake, they amended the record, and sent a transcript of the amendment to the mayor and aldermen, who did not consider themselves authorized to act upon it.

The committee are of opinion, that the proceedings of the wards having been legal and proper till after the sorting, counting and declaration of the votes, and no doubt existing as to who received the majority, the election in all the wards was valid; and neither of the memorialists having received a majority, that they have leave to withdraw their memorial."

The report was agreed to on the 20th of February.[1]

PLYMPTON.

Where a town clerk died, and the selectmen appointed a clerk *pro tempore*, who was duly sworn, and acted as clerk at an election of representative; and it did not appear that there was any fraud or intentional neglect on the part of the selectmen, or any objection on the part of the voters; the election was not thereby invalidated.

The election of Joseph B. Nye, returned a member from the town of Plympton, was controverted by Martin Perkins and five others of that town, on the ground, "that the town clerk,

[1] 74 J. H. 267.

at the time of Mr. Nye's election, held his office by an appointment from the selectmen, and not by a vote of the town."

The committee on elections, to whom the case was referred, reported thereon, that the town clerk of Plympton having died, previous to the first of November last, the selectmen, under the authority of the Rev. Sts. c. 15, § 50, appointed a clerk *pro tempore*,[1] who was duly sworn to perform his duty, and officiated as clerk at the annual election on the 10th of November, when Mr. Nye was elected a representative by a majority of seventy-five votes.

The committee further reported, that, "in the absence of all allegation of fraud, [or of any intentional neglect on the part of the selectmen,] and from the fact that no objection was raised at the time by the voters," they were of opinion, that the election was not void, and therefore that the petitioners have leave to withdraw their petition.

The report, as originally made, was amended by inserting the words in brackets, and, as amended, was agreed to.[2]

NORTH CHELSEA.

A reasonable time ought to be allowed, after a meeting for the choice of a representative is opened, to make, discuss and determine, a motion to send or not to send, especially when a town is not constitutionally entitled to send a representative every year: and if such reasonable time is not allowed, an election subsequently effected is void.

It seems, that, under the statute of 1851, c. 226, if an unsealed envelope is found in the ballot-box, the presumption is to be, till the contrary appears, that it was properly sealed when deposited; but if an envelope is unsealed when deposited, the vote enclosed in it is to be rejected.

A vote for representative, since the statute of 1851, c. 236, cannot legally be counted unless it is enclosed in an envelope.

THE election of John F. Fenno, the member returned from North Chelsea, being controverted by John Pierce and others,

[1] By the Rev. Sts. c. 15, § 49, whenever, at any *town-meeting*, there shall be a vacancy in the office of town clerk, or he shall be absent, the selectmen are to call on the qualified voters present to elect a clerk *pro tempore*; and by § 50, in *other cases*, the selectmen are authorized to appoint a clerk. The clerk, so chosen or appointed, is required to be sworn.

[2] 74 J. H. 196.

the committee on elections reported thereon, as follows, on the 18th of February:—

"A town-meeting was held in North Chelsea, on the 4th Monday of November last, for the purpose of electing a representative. Soon after the warrant was read by the town clerk, a clergyman who was present offered a prayer, at the request of the selectmen. Immediately after the prayer, or very soon after it, the selectmen declared the poll to be open, and commenced receiving votes. One of the legal voters, who was present, made a motion, which was seconded, not to send a representative; but it did not appear in evidence, that any of the selectmen heard the motion, or the seconding of it, nor are the committee satisfied, that the motion was made and seconded before the balloting commenced. The town of North Chelsea has a right to send a representative only three times during every ten years.

The result of the balloting, as declared by the selectmen, was as follows:—whole number of votes, 138; necessary to a choice, 70; John F. Fenno had 69; Henry F. Coolidge had 38; David Belcher had 16; Hiram Plummer had 15.

Two unsealed envelopes were found in the ballot-box, one of which contained a vote for John F. Fenno, and the other contained a vote for David Belcher, and both of these votes were counted. There was also one vote for John F. Fenno, which was found in the ballot-box, and which was not enclosed in an envelope, and was not counted.

The selectmen declared that there was no choice of a representative, and the meeting was dissolved.

Subsequently, a majority of the selectmen (the board consisting of three) gave Mr. Fenno a certificate of his election,[1] on the ground, that the unsealed envelope containing the vote for David Belcher was, in their opinion, not sealed when it was deposited in the ballot-box, and ought, therefore, to have been rejected.

[1] By st. 1852, c. 82, it is now provided, that "No selectman of any town in this commonwealth shall give a certificate of election to any person voted for as a representative to the general court, which certificate shall not be in accordance with the declaration of the vote in open town-meeting, at the time when the election so certified took place, under a penalty of three hundred dollars."

Upon these facts, the committee are of the opinion, that where a town has not the right to send a representative every year, the question whether it will, or will not send, in a particular year, is an important question, and one seriously affecting the rights and privileges of the town; that, therefore, a reasonable time ought always to be allowed, after a town-meeting is opened, to make, discuss, and determine motions not to send a representative; that in the case now under consideration, such reasonable time was not allowed; and that upon this ground, if upon no other, Mr. Fenno was not legally elected.

The committee are further of the opinion, that where unsealed envelopes are found in the ballot-box, the presumption ought to be, till the contrary appears, that they were sealed when deposited; inasmuch as the law requires them to be sealed, and it is to be presumed that every voter complies with the law, till he is proved to have disregarded it. The evidence, as to whether the unsealed envelope containing the vote for David Belcher was sealed when it was put into the ballot-box, is very conflicting, and, in the opinion of the committee, is not sufficient to rebut the presumption referred to, that it was sealed when deposited. On this ground, the committee are of the opinion, that Mr. Fenno did not have a majority of the whole number of legal votes which were polled.

The committee have no hesitation in saying, that as the law now stands, a vote cannot be legally counted unless it is enclosed in an envelope, and that, therefore, the selectmen properly rejected the vote, which was given, under such circumstances, for Mr. Fenno."

The report was agreed to, and the election of Mr. Fenno declared void, accordingly, on the 24th of February.[1]

[1] 74 J. H. 270.

CASE OF RALPH W. HOLMAN, MEMBER FROM BOSTON.

The election of one of the members returned from Boston being controverted on the ground of a want of residence, it appeared that the member, who had been an inhabitant of Boston for many years, had been accustomed to send his family out of town during the summer months, visiting them occasionally, and retaining rooms in Boston for his own use. In 1850, the member built a house in Newton, to which his family removed in April, 1851, but he remained in Boston, where he kept rooms for his own use, and also for the occupation of his family, when they desired; and he himself occasionally visited his family in the country, when his business would permit; but his expressed intention was to remain an inhabitant of Boston. It was held, that no change of inhabitancy was proved.

A removal from Boston (with one's family) just before the first of May, raises a strong presumption of a change of inhabitancy, but that presumption may be rebutted by evidence of the intention of the party so removing.

The election of Ralph W. Holman, one of the members returned from Boston, being controverted by Josiah L. C. Amee and four others, on the ground of a want of residence, the committee on elections reported thereon as follows:—

"The facts proved were, that Mr. Holman had been for many years a citizen of Boston, and taxed there for his personal property and poll-tax; that it had been his usual practice to send his family out of town during the summer months, visiting them occasionally as his business permitted, but keeping a room for himself in the city. In 1847, said Holman built a house in Newton, which his family occupied a short time, and then returned to Boston and spent the winter. In the spring of 1848, the family re-occupied the house and remained there till August of that year, when Holman sold the house and the family left it. In 1850, Holman, in connection with another person, built another house in Newton, and his family removed to it in April, 1851. There was evidence, that this house was only for a summer residence, and that Holman himself was only there when his business in Boston permitted his absence, and that he kept rooms for himself in Boston, and also for his family, when they desired to occupy them. It was also proved, that Holman had always refused to consider himself an inhabitant of Newton, or to vote, or qualify himself to vote there; and although assessed for his poll-tax in that town

in 1851, he procured that tax to be abated, on the ground of his being a resident of Boston.

The question raised is, whether, by the simple fact of having removed his family to Newton before the first day of May, 1851, he was compelled to become an inhabitant of that town, and forfeit his municipal rights in Boston? The committee are of opinion, that such removal before the first of May raises a strong presumption of a change of habitancy, but that this presumption may be rebutted by evidence of the intention of the party so removing.

The committee believe, that there is no sufficient proof that Mr. Holman ever intended to become a resident of Newton, but there is satisfactory evidence, that he always intended to remain a citizen of Boston.

They therefore report that the petitioners have leave to withdraw their petition."

This report was agreed to.[1]

DANVERS.

Where three representatives were to be elected, and the votes for governor, lieutenant-governor, senators and representatives, properly designated, were deposited in the ballot-box in envelopes, agreeably to the provisions of the statute of 1851, c. 226, § 1; and in one envelope, a vote for governor, lieutenant-governor, senators and *two* representatives, was upon one piece of paper, and a vote for *one* representative upon another; and, in another envelope, a vote for *three* representatives was on a separate piece of paper; it was held, that each of these envelopes was properly counted as a ballot, containing votes for governor, lieutenant-governor and senators, and for three representatives.

The election of Alfred A. Abbott, returned a member from the town of Danvers, being controverted by Charles A. Gardner and others, the committee on elections reported thereon as follows:—

"It appeared in evidence, that at the election in Danvers, on the 10th of November, 1851, the votes for representatives were received, sorted, and counted, and declaration thereof made as

[1] 74 J. H. 402.

follows:—whole number of votes, 1317; necessary to a choice, 659; John Hines had 663, Philemon Putnam had 660, Alfred A. Abbott had 658, and Messrs. Hines and Putnam were declared elected.

As to the third representative, there was no choice, and the record of the town-meeting and the certificate of election were made accordingly.

It further appeared, that in counting the votes at said election, two envelopes with their contents were rejected, because the names of the candidates voted for were not all upon one piece of paper. In one envelope, the vote for governor, lieutenant-governor and senators, and *two* representatives, was upon one piece of paper, and a vote for *one* representative upon another; and in the other envelope, a vote for *three* representatives was on a separate piece of paper; but in each case, and in regard to every name, the office voted for was indicated, and all the names of persons voted for in each envelope made the exact number necessary to constitute an entire ticket.

The name of Alfred A. Abbott was upon the separate piece of paper in each of the envelopes thus rejected.

Had these votes been counted, the ballot would have stood: whole number of votes, 1319; necessary to a choice, 660; Alfred A. Abbott had 660, and would have been elected.

In the warrant calling the town-meeting, the selectmen gave notice that all votes for governor, lieutenant-governor, senators and representatives in the general court, must be brought in on one ballot; and they rejected the two votes for Mr. Abbott, because borne on separate pieces of paper.

It further appeared, that several days subsequent to the town-meeting, the selectmen inserted the name of Mr. Abbott in the certificate containing the names of the representatives first declared elected, although the record of the town-meeting showed that he was not elected.

The committee are of the opinion, that the notice in the warrant, directing the names of all persons voted for to be on one ballot, was merely directory, and as a matter of conve-

nience,—and as there could be no doubt of the intent of the voter, and no uncertainty as to the whole number of ballots cast, the two votes rejected should be counted for Mr. Abbott, thus making the number necessary for a choice.

The committee therefore recommend that the petitioners have leave to withdraw."

The report was agreed to.[1]

BOLTON.

Whether the ballots contained in unsealed envelopes are to be counted as votes—*Quære.*

Whether a separate ballot, found in an envelope, containing a ballot for governor, lieutenant-governor, and senators, but, without any designation of the office for which it was intended, can be counted as a vote for representative—*Quære.*

Whether ballots found in envelopes that have been used, opened, and thrown away, and carried from the meeting, can be counted—*Quære.*

The election of Edwin A. Whitcomb, returned a member from the town of Bolton, was controverted by Caleb J. Nourse and others, on two grounds, namely, first, that at the annual meeting on the second Monday of November, when the election took place, nine unsealed envelopes were received, which the selectmen refused to count; and, secondly, that the selectmen also neglected to take out of certain other envelopes and count two representative votes for a person other than said Whitcomb. The petitioners alleged, that if the votes contained in the nine rejected envelopes had been counted, there would have been no choice of representative.

It appeared in evidence, at the hearing before the committee on elections, to whom the case was referred, as follows:—

The whole number of votes counted by the selectmen for representative was 215; necessary to a choice, 108; Edwin A. Whitcomb had 110; Richard S. Edes, 89; Samuel W. Kendall, 14; Caleb Nourse and J. E. Sawyer, 1 each. Mr. Whitcomb was declared to be elected, and received a certificate of his election.

[1] 74 J. H. 367.

In counting the votes, the selectmen laid aside and rejected nine unsealed envelopes, which, before a declaration of the votes was made, were afterwards opened and examined by John E. Frye, and found to contain votes, as Mr. Frye testified, for Richard S. Edes, 4; for Samuel W. Kendall, 3; and for Edwin A. Whitcomb, 2. There was some contradictory evidence, as to what Mr. Frye declared to be the contents of the envelopes examined by him, immediately after the examination, but the witness himself adhered to his statement as above.

Thomas Houghton, one of the voters, took home with him from the meeting a number of the envelopes, which had been used, and, on looking them over an hour or two afterwards, found one in which there was a vote for Samuel W. Kendall for representative.

Joseph Sawyer, another of the voters, carried a handful of the used envelopes, after the meeting, to his store, in one of which he found a vote for Kendall for representative. The votes for Kendall were on separate pieces of paper; those for the other candidates were on the ballots for governor, &c.

It appeared, further, that the selectmen rejected the vote of John Stone, which would have been given for Mr. Whitcomb, on the ground, that Stone had ceased to be an inhabitant of Bolton, where he had resided for some years previous. The evidence in regard to the inhabitancy of Stone tended to show, that he had removed his family, and a part of his household furniture from Bolton on the Friday previous to the election; he himself remaining in Bolton to settle up his affairs, and declaring his intention not to remove therefrom until after the election.

It appeared, also, that in one of the envelopes, there was found a vote for governor, together with a vote for Whitcomb, on a separate piece of paper, on which the office was not designated. This vote was not counted.

The committee reported, that, upon the evidence in the case, a majority of them were of opinion, that the member returned did not receive a majority of the votes, and, therefore, was not entitled to a seat as a member.

Three members of the committee, (Messrs. *Schouler*, *Jones*, and *Bond*,) dissenting from the report, presented their views to the house, in a minority report, containing a statement of the evidence in full, and concluding as follows:—

"The undersigned believe, that the petitioners have failed to make out a case, which would justify the house in unseating the member, and they rely upon the evidence to support their opinion.

There is no doubt in regard to the legality of the meeting on the 10th of November. It was properly held and fairly conducted, from beginning to end, and Mr. Whitcomb was declared to be chosen, and his certificate was given to him by the selectmen.

The petitioners rely upon two facts to vitiate the election and declare the seat vacant. These are, that if the unsealed envelopes had been counted, Mr. Whitcomb would not have had a majority of the votes, and therefore would not have been elected; and they also claim, that the two votes for Mr. Kendall, which were subsequently found by Sawyer and Houghton, ought to have been counted.

As regards the first point, there is a direct conflict of evidence. Mr. Frye, who opened the nine unsealed envelopes, swears positively that they contained four free soil, two democratic, and two whig votes. On the other hand, Capt. Bernard, chairman of the selectmen, who handed the votes to Mr. Frye to open and count, swears as positively that Mr. Frye, immediately after opening and counting them, told him that they contained four votes for Mr. Whitcomb (whig), three for Mr. Edes (free soil), and two for Mr. Kendall (democrat); and that Mr. Frye said, that if counted they would not alter the result. Mr. Frye admits that he repeated in the evening, that the nine votes would not alter the result, but it was under a misapprehension.

The undersigned cannot believe, that the house, for one moment, will sanction or allow the two votes found in the broken envelopes in the evening,—one in a store and the other in a private house,—to be counted. Were such a rule to be estab-

lished, there would be no security against fraud, and no means to guard the ballot-box from the most flagrant abuses. And again, it can be said as an offset, that if all the broken envelopes had been counted, votes might have been found in some of them for Mr. Whitcomb. No assurance can be given, that these two envelopes did not each contain a full vote which was counted; or that the two votes found as above stated, were not either fraudulently or accidentally put in the envelopes, in addition to the two that were subsequently found. Of course the undersigned attribute nothing of the kind to either Mr. Sawyer or Mr. Houghton.

But allowing, for the sake of the argument, that the votes found in the nine envelopes opened by Mr. Frye were as he stated them to be, and that they should have been counted: That would have made the whole number of votes 224; necessary to a choice, 113. Mr. Whitcomb had 112—just one-half. If the selectmen had received the vote of Mr. John Stone, as we believe they ought to have received it, Mr. Whitcomb would have been elected. Again, if the vote having Mr. Whitcomb's name upon it, but which was not counted because the office was not designated on the ballot, had been counted, Mr. Whitcomb would have been elected without the aid of Mr. Stone's vote.

We say, therefore, even upon the hypothesis that the votes found in the nine envelopes were as Mr. Frye testified that they were, Mr. Whitcomb would have been elected. Upon the other hypothesis, to wit, that the votes in the nine envelopes were as Capt. Bernard swears Mr. Frye told him they were, then Mr. Whitcomb would have been elected, even if the two votes for Mr. Kendall, found by Mr. Houghton and Mr. Sawyer, were counted.

The undersigned therefore report, that the petitioners have failed to make out their case, and that they have leave to withdraw their petition, and that Edwin A. Whitcomb is entitled to his seat as a member of this house, from the town of Bolton."

The report was amended by striking out the last paragraph,

and inserting as follows,—"That the petitioners have not made out their case, and have leave to withdraw;" and, as amended, was agreed to.[1]

HOPKINTON.

Where an election was controverted on the ground that the votes in unsealed envelopes were rejected, which, if they had been received, would have prevented an election; and the committee on elections reported thereon, that the number so received was not certainly proved; that they were not examined until more than an hour afterwards, during which time, they were out of the custody of the selectmen; that only three were certainly proved to have been received, one of which was unsealed when deposited, and two unsealed envelopes which were examined contained votes for the sitting member; it was held, that such election was valid.

The election of William Claflin, returned a member from the town of Hopkinton, was controverted by Jefferson Pratt and others, for certain reasons stated in the report of the committee on elections, to whom the case was referred, as follows:—

"At the annual election in Hopkinton on the 10th of November last, the declaration of the selectmen on the vote for representative was as follows:—whole number of ballots, 437; necessary for a choice, 219. William Claflin had 219; Charles Seaver, 212; A. W. Johnson, 3; L. P. Coburn, 1; D. J. Nye, 1; J. A. Fitch, 1; and William Claflin was declared to be chosen. The record was made up in accordance therewith, and a certificate duly issued thereon.

The petitioners set forth, that 'the selectmen refused to count seven ballots, found in unsealed envelopes, and that if all the ballots given in for a representative had been counted, no person would have been constitutionally elected.'

It appeared in evidence before the committee, that, upon opening the poll, the selectmen cautioned the voters to be careful that their envelopes were sealed, as they had decided that their duty required them to reject all that should be found unsealed, and none such would be counted. This ad-

[1] 74 J. H. 508.

monition was repeated once or more during the balloting, and particularly on one occasion of the depositing of an envelope, when the chairman announced to the meeting, that one of the electors had lost his vote, by depositing it in an envelope that was unsealed.

The votes were received by the chairman of the selectmen at the desk, two other selectmen standing by him to keep the check lists, while the other two, as soon as a suitable time came for emptying the box, were engaged in opening the envelopes and arranging the votes. This was done on a seat formed by a recess for a window, which served the purpose of a table, in the rear of the desk. Thus, the selectmen were so arranged that their backs were toward each other, with a seat interposed between, so that the person who received the votes, and those who opened the envelopes, would neither of them be under the observation of the other. As often as more envelopes were wanted for counting, the box was emptied. As the envelopes were examined and counted, whenever any were found unsealed, they were thrown aside without further examination, and without any further care in relation to them, the selectmen testifying that they considered them of no consequence whatever. When the poll was closed, the votes were taken to the desk and there counted by the whole board of selectmen. The counting and declaration occupied from three-fourths of an hour to an hour, during which time the unsealed envelopes were left in the window, out from under the care or observation of the selectmen; and more or less of the people of the town had pressed into the inclosure about the desk, and occupied the space behind the selectmen, and between them and the window where the unsealed envelopes were laid. After the counting was finished and the declaration made, the chairman took from the window seven unsealed envelopes, and found the votes for representative therein to be five for Charles Seaver and two for William Claflin. Neither of the other selectmen examined these ballots.

The chairman of the selectmen testified, that he did not know, from his own personal knowledge, that more than one

unsealed envelope was received. He also testified, that he did not know where those that he examined came from, or how they came in the window from which he took them. The selectmen who opened the envelopes were unable to tell how many of them they found unsealed. But one of the two was called to testify in the case, and he would not swear positively that there were more than three, though he thought there were four, and there might be more. He did not know but there might be six or even ten. In fact, he seemed to have no distinct recollection about the number, and gave as a reason for it, that he took no particular notice of them, because he considered them of no consequence. He also swore that he did not know, that the envelopes examined by the chairman were the same that they threw out.

From this statement of facts, we come to these conclusions:

1. That the number of unsealed envelopes found among those that were duly received is left in doubt, not more than three being certainly proved.

2. Those which were found are not satisfactorily proved to have been the same, or any portion thereof, that were afterwards examined by the chairman of the selectmen, about an hour's time having intervened, during which they were out of the possession or care of the selectmen, and so left, that sundry persons had the opportunity to add to or abstract from their number, or to change them entirely.

3. If the three unsealed envelopes, which are proved to have been duly received and thrown out by the selectmen, had also been proved to be among the seven examined by the chairman, it would not diminish the doubt; because, one of those is proved to have been open and known to be open, when received, and therefore was clearly illegal, and among those examined by him were two votes for the sitting member.

We therefore think that the petitioners have failed to sustain their positions, and report that they have leave to withdraw their petition."

Three members of the committee, (Messrs. *Schouler*, *Jones*, and *Bond*,) dissenting from the conclusions of the report, pre-

sented a statement of the evidence in the case, and concluding thereupon as follows:—

"The case is as follows:—At the November election, Mr. Claflin was declared elected a member of this house from Hopkinton. He had just the required number of votes to elect him. Seven unsealed envelopes found in the ballot-box were not counted. These seven envelopes were afterwards taken by the chairman of the selectmen, opened, and counted. They contained two votes for Mr. Claflin, and five against him. Of course, if they had been added to the count by the selectmen, Mr. Claflin would not have been declared elected. It is clear, therefore, that he did not receive a majority of the votes of Hopkinton.

The report of the majority attempts to throw doubts upon the testimony. But if the fact that there were seven unsealed envelopes, and that two of them only were for Mr. Claflin, is not proved, then there has been no fact proved before the committee the present session. The chairman of the selectmen swears positively to the fact, and he is the only one who could thus swear. This is the only point in the case. It is the whole case.

The undersigned therefore report, that the petitioners have made out their case, and that Mr. Claflin is not entitled to a seat in this house, as a member from the town of Hopkinton."

The report, giving the petitioners leave to withdraw, was agreed to.[1]

SUNDERLAND.

Where the selectmen, after counting the ballots given in at an election for representative, and declaring that an election had been effected, subsequently found among the used and broken envelopes two additional ballots for representative, and, thereupon counselled together, added the votes so found to the count, and declared that no election had taken place; it was held by the house, that such ballots ought not to have been counted.

THE election of Timothy Graves, returned a member from the town of Sunderland, was controverted by Horace Lyman

[1] 74 J. H. 511.

and others, for reasons which are stated in the report of the committee on elections, which contained a statement of the evidence, in full, and concluded as follows:—

"From the evidence in the case, it appears that a declaration was made of the votes for representative, by which it appeared that the whole number was 186; necessary to a choice, 94; Timothy Graves had 94, and he was declared duly elected.

That immediately afterwards two more votes for representative were found in envelopes, which envelopes had not been taken out of the presence of the selectmen. These two votes were for Wm. W. Russell. Had these votes been discovered and counted before the first declaration, the vote would have stood as follows: whole number, 188; necessary for a choice, 95; and no one had that number.

The selectmen considered that these two votes were legally cast, and ought to be counted, and did accordingly count them, and made a new declaration that there was no choice of representative, and thereupon the meeting voted not to send a representative, and adjourned. Four days afterwards, under a demand from Mr. Graves for a certificate, the selectmen consulted counsel, and were advised that it was their safest way to give the certificate, as they might be liable in case of a refusal, and that if there was any error it could be corrected here. In accordance with this advice, they granted the certificate under which Mr. Graves holds his seat.

The committee are of opinion, that the selectmen rightfully counted the two votes, found in the envelopes after the first declaration, and that there was no choice of representative in Sunderland on the second Monday of November last.

The committee further declare it as their firm conviction, that the certificate subsequently given to Mr. Graves, under an apprehension of liability in case of refusal, was unwarranted either by the laws of the commonwealth, or by the facts proved.

The committee, therefore, feel compelled to report:—

That Timothy Graves is not entitled to a seat as a member of this house."

Three members of the committee, (Messrs. *Schouler*, *Jones*, and *Bond*,) dissenting from the above report, presented their views as follows:—

"The facts of the case, as shown by the evidence, are these: At the election held in the town of Sunderland, on the 10th of November last, Timothy Graves was declared elected a representative in the general court, and it also appeared that subsequently a voter of the town, having received from one of the selectmen a number of the envelopes which had been used in the election, found, as he swears, a vote in one of them for William W. Russell, which vote he showed to one of the selectmen. After this fact was known, another of the selectmen found, in overhauling the broken envelopes, another vote for the same William W. Russell. They then held a consultation and agreed to make another declaration, which they did, namely: That Mr. Graves was not elected. After doing so, the meeting, there being only seven persons present, voted first not to send, and then to dissolve the meeting. It further appears that the selectmen took counsel of Judge Forbes and Charles P. Huntington, Esq., of Northampton, gentlemen of distinguished legal ability, as to the course for them to pursue in the premises. Mr. Graves having asked them for his certificate, they were advised to give Mr. Graves his certificate. They gave it to him, and Mr. Graves accordingly took his seat in this house.

These are the facts of the case. The majority of the committee have come to the conclusion, that Mr. Graves is not entitled to his seat, and that the two votes subsequently found in the broken envelopes, after the declaration had been made and Mr. Graves declared elected, ought to have been counted, and Mr. Graves refused his certificate. They say that the selectmen were bound to count those two votes, and declare that no election had been made. We take issue with them upon this point.

The undersigned ask the serious consideration of the house to this case, and to the decision of the majority. It is of the very first importance. There is a principle involved in it of

the greatest magnitude; a principle which involves in a vital and permanent degree the security and the purity of the elective franchise; and we cannot bring ourselves to believe, that if the house will give the subject a calm and unbiassed consideration, they will sustain the position assumed by the majority.

We shall not weary the attention of the members, by detailing to them the collateral questions involved in the evidence. They are unimportant in themselves, but when considered in relation to their bearing upon the main issue, serve to elucidate the great and important point involved in the case, which we hold to be this: That whenever a doubt exists as to the truthfulness or legality of a vote, that doubt shall be given on the side of truth and legality; that if there be any practice, we care not what it is, which if carried into our elections can be made the means of gross fraud and deception, that practice is to be avoided.

It has been the boast of our state, that the legislature of Massachusetts, from time immemorial, has guarded by wise statutes the purity of the ballot-box, so that a true expression of the wishes of the voters of the state might always be attained. For this reason it is, that we have laws which prescribe certain fixed duties to the selectmen and presiding officers at town-meetings. The selectmen, before entering upon the discharge of their responsible duties, are required to make oath, that they will fairly and impartially perform those high and responsible duties. The recording officer is required to be sworn to the proper discharge of his duty. The votes are required to be counted, sorted, declared, and sealed up in open town-meeting. The list of votes is required to be made out and the list and check are required to be used in these elections, and no man is permitted to put his vote into the ballot-box, until his name is first found upon the check list and checked by the presiding officer. Unless each and all of these requisitions are complied with, the election is not according to law. Severe penalties are prescribed for fraudulent voting.

By wise and salutary checks, the laws of Massachusetts keep

pure the fountain-head of political power, and they have been to our commonwealth a savor of right unto liberty. But let us once adopt the principle upheld in the decision come to by the majority of the committee in this case, and we open wide the sluice-gates for all sorts of abominations, cheating, and corruption in our elections, which will last as long as we have upon our statute books the law of the last session, known as the secret ballot law, in the practical exercise of which this case, and many others, have been brought before this legislature for examination.

It is proposed by the majority to unseat Mr. Graves, because, after the envelopes were opened, counted, the declaration made, and he declared elected, and after many of the broken envelopes had been scattered upon the floor, and some of them taken away, two votes were found for another person, one by a selectman and another by a citizen of the town, not an officer, nor sworn to discharge any duty. We ask, in all candor, who is there that knows anything of these two votes? who can, of his own knowledge, tell whether they were true or fraudulent votes. We of course impeach the character of no man when we put this question, but we put the question, and we would press it home to the mind of each member of this house. We repeat it, and we would like to have an affirmative answer given, if one can be given. Who can tell whether these two votes were put into the envelopes fairly or fraudulently? All we know is, that they were not found by the selectmen when they first opened the envelopes; they were found afterwards, and after a portion of them had passed from their hands. But how they came there, but one power, short of omnipotence, can answer, and that is the voter himself. The selectmen could not tell. The house cannot tell. It is a secret past our finding out. The majority of the committee, by their decision in this case, say, in effect, that they believe the votes were properly there, and that they should have been counted. But the majority do not know the fact, and cannot, from the very nature of the question, know it. It is a sealed book to all the world.

But the principle involved is the important point. It is of vastly more importance to the people of this commonwealth, than whether Mr. Graves shall be suffered to retain his seat or shall be sent home. So long as the secret ballot law remains a living, active agent in our elections, the principle involved in this case will never cease to be felt. Cheating would become, as Shakspeare says, 'as easy as lying' in every election, if we establish as a rule the principle involved in the report of the majority. Unprincipled men could and would use, and they have used, this secret envelope system for double voting. Who can tell that it was not so used in Sunderland? We do not say that it was. We cannot tell. Who can tell that from each of the envelopes in which these votes were found, a ballot containing a full vote for governor, lieutenant-governor, senators and representatives to the legislature, on one piece of paper, had not previously been taken, and when taken the broken envelopes had been thrown aside by the selectmen, they of course supposing that there was nothing else in them; but subsequently, when it was impossible to identify the envelopes, they had been re-examined, and other votes for representatives were found therein. Who can answer this question? Who is so blind as not to see, that if we establish the principle, that the envelopes, after they have once passed from the hands of the selectmen,—who, it is presumed, have carefully examined the inside,—shall be examined again, and if a slip of paper is found therein, bearing the name of a candidate for the legislature, that it is to be counted as a good vote, although they cannot tell whether or not they had taken already one vote for representative from that same identical envelope; who, we say, is there so blind as not to see, that it is adopting a rule of action, which will open wide the door to fraud and corruption; and if we adopt the report of the majority, and unseat Mr. Graves, we adopt that rule,—we make it a part of our laws concerning elections.

But it may be said, and doubtless will be, that this will not be practised. In answer, we say that it has been practised. There is a member holding a seat in this house, who was de-

feated on the first Monday of November by this very means. Fifteen more votes were cast in his town for representatives than there were envelopes in the box, and of course these fifteen must have been put in fraudulently. It is offering an immunity to fraud. Any man can vote double in this way, and forever escape detection.

For these, and other reasons which we might name, the undersigned cannot concur with the report of the majority. In presenting our views to the house, we have said nothing about the character of the testimony in this particular case. It will be found correctly reported in the report of the majority. We have preferred to consider the question as one involving a vital principle, so far as the purity of our elections is concerned. It is a case which has arisen out of the secret ballot law of the last session. The committee have had no precedents in the books to guide them in their decision. This house is to fix a precedent by their vote upon this question, and from that fact the case receives a great share of its importance.

The undersigned ask that it may be decided in such a manner as shall tend to perpetuate the purity of the ballot in this commonwealth; and, in conclusion, they report that the petitioners have failed to make out a case, and that Timothy Graves is entitled to his seat, and that the petitioners have leave to withdraw their petition."

The report was amended, agreeably to the suggestion of the minority, by striking out the conclusion thereof, and inserting, instead of the same, "That the petitioners have leave to withdraw;" and, as amended, was agreed to.[1]

[1] 74 J. H. 511, 512.

CHESTER.

If some of the votes given in at an election for representative are not taken from the envelopes and counted, the election will not be thereby affected, provided it is admitted or proved, that the member elected received a majority of all the votes.

It is the duty of selectmen, with the assistance of the town clerk, to receive, sort and count the votes at an election for representative; but if they call in the assistance of other persons, in the performance of this duty, that circumstance will not, of itself, invalidate an election.

THE election of Samuel Henry, returned a member from Chester, was controverted on the following grounds, set forth in the petition against the same:—

1. That a majority of the selectmen did not attend to the opening of the envelopes and counting of the votes, at the time of the election.

2. That two persons, neither of whom was a selectman, or had been sworn, assisted in performing the duty of opening the envelopes, taking the ballots therefrom, and counting the same.

3. That all the votes given in for representative were not taken from the enevelopes; [but were allowed to remain therein, and were not counted; and all these votes were for other persons than the member declared to be elected.]

4. That undue liberties were taken with the envelopes and votes generally.

The committee on elections reported thereon as follows:—

"The facts or allegations contained in the second and third heads are conceded, or rather not controverted, or disputed. Under the fourth head of the petition, the petitioners express an opinion in relation to the election, which they doubtless honestly entertain, but which after due consideration the committee are not satisfied to be well-grounded in fact. It has been the practice in some towns in the commonwealth, as the committee have been informed, for the selectmen to call in the assistance of other persons in assorting and counting votes at elections; but the committee are of the opinion, that such a practice or custom should under no circumstances exist, it being the duty of the selectmen to receive, assort, and count the votes

without any assistance except that of the town clerk. The almost universal right of suffrage is the peculiar feature of our form of government, and the privilege of every freeman; therefore the ballot-box cannot be too scrupulously guarded, even by those officers to whose supervision it is intrusted, and who are sworn to the faithful performance of their duties. After due investigation of all the facts and allegations submitted to the consideration of the committee, they are of the opinion, that sufficient cause has not been shown by the petitioners to justify vacating the seat of Mr. Henry, the sitting member; it being admitted by the petitioners that he received a majority of all the votes cast for representatives, and they therefore report that the petitioners have leave to withdraw their petition."

The committee having made the petition a part of their report, the third specification was amended by striking out the words in brackets, and the report was then agreed to.[1]

OTIS.

At a meeting for the election of a representative, held on the fourth Monday of November, the selectmen refused to put a motion, properly made and seconded, to dissolve the meeting, but proceeded to call for and receive votes for a representative; it was held, that an election, so effected, was void.

It is not necessary to the validity of a meeting, for the election of a representative, on the fourth Monday of November, that a petition should be previously presented to the selectmen to call the same, or that they should state any reason, at the opening of the meeting, for having called it.

THE committee on elections, to whom this case was referred, reported thereon as follows:—

"A town-meeting was held in Otis on the 10th day of November last, at which the votes for a representative were as follows:—whole number of votes, 215; necessary for a choice, 108; Lorenzo Webb had 103; Rufus Pomeroy, 99; scattering, 13.

After the result of the balloting was declared, it was voted,

[1] 74 J. H. 609.

by a bare majority, not to send a representative, and the meeting was then dissolved.

A second town-meeting was held in Otis on the 24th day of November, in pursuance of a warrant issued by the selectmen. There is no evidence that a petition was presented to the selectmen to call the meeting, and they stated no reason at the opening of the meeting for having called it. As soon as the town clerk had read the warrant and return, a motion was made and seconded to dissolve the meeting. The chairman of the selectmen then stated, that the meeting was not yet opened, because the poll had not been declared by him to be open. Subsequently the chairman said, 'The poll is now open, and we will receive votes for a representative.' A motion was again immediately made, and seconded, to dissolve the meeting. The selectmen, after a consultation of an hour or more, decided not to entertain the motion and refused to put it. Another motion was then made and seconded, to adjourn the meeting till the next day. The chairman of the selectmen declined to put that motion, assigning as a reason that it amounted to the same as a motion to dissolve the meeting, as that was the last day on which a meeting for the choice of representative could be held. The selectmen then proceeded to receive votes for a representative, and the result of the balloting was as follows:—whole number of votes, 219; Lorenzo Webb had 111, John V. Cottrell had 102, scattering, 6; and Lorenzo Webb was declared to be elected.

It has been frequently decided by this house, that an election of a representative is illegal and void, if, at the meeting at which such representative was elected, the selectmen refuse to put a motion not to send a representative, or did not allow sufficient time, after the meeting was opened, for such a motion to be made and put. The committee see no distinction in principle between these cases and the one now under consideration. The only business, to be transacted at the meeting at which Mr. Webb was elected, was to choose a representative, and a motion to dissolve the meeting would have had the same effect, in every respect, as a motion not to

send a representative. The committee are therefore of the opinion, that Mr. Webb was not legally elected, and they report that his seat ought to be vacated."

The report was agreed to.[1]

HULL.

Petitioners against an election, at their own request, have leave to withdraw their petition.

THE election of Martin Knight, the member returned from the town of Hull, was controverted by Ichabod Spooner and two others, on the ground, that the election was obtained by said Knight, who was one of the selectmen of the town, by illegally rejecting the vote of said Spooner.

The committee on elections, to whom the petition was referred, reported that the petitioners, at their own request, should have leave to withdraw their petition, and this report was agreed to.[2]

[1] 74 J. H. 705. [2] Same, 455.

SUPPLEMENT.

RIGHT OF INHABITANTS OF UNINCORPORATED PLANTATIONS TO VOTE FOR GOVERNOR AND LIEUTENANT-GOVERNOR.

The inhabitants of unincorporated plantations are not included in the description contained in the constitution of the persons qualified to give in their votes for governor and lieutenant-governor.

A letter from the justices of the supreme judicial court to the governor of the commonwealth of Massachusetts, in answer to a question upon which he had requested their opinion.

MAY IT PLEASE YOUR EXCELLENCY.

We have received your letter requesting of the justices of the supreme judicial court, agreeably to the provision of the constitution, their opinion on the following question:—

"Whether the constitution of this commonwealth authorizes the inhabitants of any of the unincorporated plantations in the state to give in their votes for governor and lieutenant-governor?"

Having considered that question, we now transmit to your excellency the best opinion we have been able to form.

The constitution of the commonwealth is an original compact, expressly, solemnly, and mutually made between the people and each citizen. On this compact are founded, not only the powers and duties of the several magistrates and officers of government, as the substitutes and agents of the people, but also the political rights and privileges of each citizen. The answer to the question must, therefore, solely depend on the construction of the constitution.

As the description of the qualified voters for governor refers to the qualifications of voters for representatives and senators, it is necessary to consider those parts of the constitution, which

respect, as well the election of the two branches of the legislature, as of the first executive magistrate.

In the 4th article of the 3d section of the first chapter, the citizens, having the right to vote in the choice of a representative, are very accurately described. This right is vested in every male person, twenty-one years of age, resident in the town, for whose representative he shall vote, for one year next preceding, and having the estate in that article mentioned.

The qualifications of the voters for senators are described in the 2d article of the 2d section of the same chapter. In the first paragraph, it is declared, that at a meeting of the inhabitants of each town in the commonwealth, every male inhabitant of the age of twenty-one years, having the estate there mentioned, shall have a right to give in his vote for the senators of the district of which he is an inhabitant.

By the 2d paragraph, the selectmen of the several towns are obliged to preside at such meetings, and to receive the votes of all the inhabitants of such towns, present and qualified. And provision is made for the counting of the votes by the selectmen, in the presence of the town clerk; for recording the same in open town-meeting by the town clerk, in the presence of the selectmen; and for the transmission to the secretary's office of the list of votes, by the delivery to the sheriff, by the town clerk, of a copy of the record attested by him, and by the selectmen, sealed up and superscribed to the secretary; or by a delivery of a copy of that record at his office. If the constitution had given no further description of any other persons, who might vote in the choice either of representatives or of senators, the conclusion is manifest, that no citizen, unless an inhabitant of some town, could be deemed a legal voter.

As early as the year 1761, an act was passed, providing for the levying and collecting of province and county taxes on plantations not incorporated, and for this purpose obliging the inhabitants of plantations, thus taxed, to choose clerks, assessors and collectors. This act was in force when the constitution was formed, and a practice had existed of levying public taxes on certain unincorporated plantations.

The 23d article of the declaration of rights had provided, that no tax ought to be levied, under any pretext whatever, without the consent of the people, or of their representatives in the legislature. The operation of this article would control not only the method then existing of levying county taxes, by rendering the consent of the legislature necessary to the assessment, but would also exempt from the power of taxation by the general court all unincorporated plantations, unless some further constitutional provision should be made.

It was, therefore, thought necessary, either to provide some representation in the legislature for the unincorporated plantations, on whom public taxes had been or were to be levied, or to abandon the usage of taxing them. To give them representatives in the house would be inconvenient, if practicable. But to admit them to a representation in the senate was a provision easy to make, and the right to tax them would remain. On this ground, the third paragraph was introduced, extending to two classes of unincorporated plantations. One class comprehends the plantations who were assessed to the support of government, by the assessors of adjoining towns. The inhabitants of these plantations, having the necessary qualifications of age and estate, were authorized to meet and vote for senators, with the inhabitants of the towns by whose assessors they were assessed. The other class comprehends the plantations who were empowered to assess themselves. The inhabitants of these plantations, duly qualified as to age and estate, were authorized to meet and vote for senators, within their plantations, and for the purpose of receiving, counting, declaring, and returning the votes, their assessors were substituted in the places, both of the selectmen and clerks of towns.

No provision was necessary for plantations on whose inhabitants public taxes were not levied.

We shall now advert to those parts of the constitution, which have a more express relation to the proposed question, and they are contained in the first section of the second chapter.

The 3d article declares that those persons, who shall be qualified to vote for senators and representatives within the

several towns, shall, at a meeting to be called for that purpose, give in their votes for a governor to the selectmen, who shall preside at such meetings; and the town clerk, in the presence, and with the assistance of the selectmen, shall, in open town meeting, sort and count the votes, form a list of the persons voted for, with the number of votes for each person against his name, make a fair record of the same in the town books, and a public declaration thereof in the same meeting, and shall, in the presence of the inhabitants, seal up copies of the said list, and transmit the same to the sheriff; or the selectmen may cause returns of the same to be made to the office of the secretary.

From the language of this article, it very clearly appears to us, that no person, although qualified by his age and estate, can legally vote for governor, unless he is an inhabitant of some town, or of some corporation having all the powers, privileges and immunities of and by law deemed to be a town, so far as may relate to the subject of this article. For his vote must be given at a town-meeting, which, from the force of the term, must be an assembly of town inhabitants, to be called for that purpose, and to the presiding selectmen; and the list of votes must be recorded by a town clerk, in the town books, in open town-meeting, and a copy of it sealed up in the presence of the inhabitants.

The consequence therefore is inevitable, that the inhabitants of unincorporated plantations, not being able to assemble in town-meeting—having no selectmen to preside—nor town clerk to form a list of votes, or to record it in open town-meeting, or to seal up a copy of it, in the presence of the inhabitants, are not included in the description of the persons qualified to give in their votes for a governor.

If there is any part of the constitution which can excite a color of doubt on this subject, it must be the section describing the qualifications of voters for senators. In the 3d paragraph of that section, the inhabitants of certain unincorporated plantations are admitted to the privilege of a representation in the senate; and the reason for that admission has already been

mentioned. To extend the privilege further is without the letter of the constitution, and is required neither by the principles, nor spirit of it, which does not consider a governor as a representative of the people in their legislature.

If the convention had intended to vest this privilege in the inhabitants of unincorporated plantations of any description, it was easy to express that intention, and to provide for its execution; for the manner of choosing senators had already been defined. And in the election of the first executive magistrate, it is difficult to assign a good reason why plantations, taxed for the support of government, should be distinguished from all other plantations, who are alike interested in that election.

If it should be supposed that this mode of reasoning will exclude inhabitants of districts from voting for governor, because they have not the corporate names of towns; it may be observed, that the argument is not founded merely on the name of the corporation, but on the nature and extent of its powers, privileges and immunities, and on the description of the officers it is by law competent to elect. It was formerly the usage of the legislature to incorporate the inhabitants of particular places, not only by the name of districts, with all the powers, privileges and immunities of towns, except the right of choosing a representative, but also by the name of towns, with the same powers, privileges and immunities, and under the same exception. From the terms of the incorporation, therefore, it appears, that districts are towns, with the same officers, but without the right of electing a representative. And because the late province statute of 1 Geo. III. c. 2, on this principle, had enacted, that districts should, to all intents and purposes, be considered as towns, the privilege and duty of sending a representative excepted, it was unnecessary, in the constitution, to distinguish districts from towns. For the inhabitants of districts having all the powers, privileges and immunities of towns, and being by law to be considered as towns, to all intents and purposes, except in the election of a representative, whatever privilege, not within that exception, is vested, by the constitu-

tion, in the inhabitants of towns, may be enjoyed by the inhabitants of districts.

It is unnecessary to consider distinctly the qualifications of the voters for a lieutenant-governor, for by the 2d section of the 2d chapter of the constitution, that officer is to be elected by the same persons, and in the same manner, as are prescribed for the election of the governor.

Without detaining your excellency any longer, we are obliged, after full deliberation, to certify as our opinion,

That the constitution of this commonwealth doth not authorize the inhabitants of any of the unincorporated plantations in the state to give in their votes for governor and lieutenant-governor.

We are, with respect,

Your excellency's humble servants,

THEOPHILUS PARSONS,
SAMUEL SEWALL,
GEORGE THATCHER,
ISAAC PARKER.

Boston, January 3d, 1807.

COMMONWEALTH *v.* JAMES H. B. AYER AND OTHERS.

[The defendants, who were the mayor and aldermen of the city of Lowell, being indicted and tried in the court of common pleas, at the February term thereof, 1852, for the county of Middlesex, for a neglect of official duty in regard to the return of representatives from that city, the case was taken from the jury by consent, and referred to the court upon the questions of law involved in it; upon which the following opinion was afterwards delivered by the Hon. E. Rockwood Hoar, one of the justices of the court of common pleas.]

"This is an indictment against James H. B. Ayer, the mayor, and William North and seven others, aldermen, of the city of Lowell, for the year 1851, for neglect of official duty in regard to the election of representatives in the general court at the election of that year. The indictment contains three counts.

The first count charges, in substance, that at legal meetings of the qualified voters of the city of Lowell, held in the several

wards of that city on the 10th of November, 1851, James K. Fellows and seven other persons named, being severally eligible, were elected representatives from that city to the next general court; and that the defendants wilfully neglected and refused to give notice to said Fellows and others, of their election, either within three days of the said 10th of November, or at any other time, by a constable or any other person.

The second count alleges the election of the same persons, on the 10th of November, as representatives in the same manner; that the votes given in were sorted, counted, and declared by the warden and inspectors in the several wards, and were thereafter duly recorded by the ward clerks; that true transcripts of said records, certified by the warden, clerk, and a majority of inspectors in each ward, were duly transmitted to the city clerk, within two days and before the meeting of the mayor and aldermen to examine and compare the returns and transcripts aforesaid, and were by him duly laid before the mayor and aldermen at their meeting for that purpose; yet that the defendants have ever since wilfully neglected and refused to make out a certificate of said election or the result thereof, under their hands or the hand of either of them, to be signed by the city clerk, and delivered into the office of the secretary of the commonwealth; and have wilfully neglected and refused to certify said election and the result thereof to the house of representatives to their acceptance.

The third count merely alleges the election of Fellows and others as representatives, and charges the same wilful neglect and refusal as in the second.

The evidence at the trial, so far as it was material to the case which the prosecution sought to establish, disclosed the following facts:—

That the election was regularly held, and the votes received, sorted, declared and recorded by the proper officers in the several wards; and no question was made as to the returns of the votes, or the action of the mayor and aldermen concerning them, excepting upon the return from the fourth ward.

A return from the fourth ward, under the hand of the

warden, inspectors, and clerk of the ward, purporting to be a transcript of the record of votes received, sorted, counted, declared, and recorded in open ward-meeting, was sent to the city clerk's office on the evening of the day of election. Its material parts were as follows: —

'COMMONWEALTH OF MASSACHUSETTS.

[E.] At a legal meeting of the inhabitants of ward number four in the city of Lowell, qualified to vote according to the constitution, holden in said ward on Monday, the tenth day of November, in the year one thousand eight hundred and fifty-one, for the purpose of giving in their votes for governor and lieutenant-governor of this commonwealth, senators for the district of Middlesex, and representatives from said Lowell to the general court, the whole number of persons who gave in their votes was ascertained as is directed in the Revised Statutes, (c. 4, § 13,) by counting the whole number of separate ballots given in; and the whole number of votes given in were sorted, counted and declared, and were as follows: —

The whole number of ballots for governor, eight hundred eight, - -	808
Robert C. Winthrop, of Boston, three hundred forty-four, - - -	344
George S. Boutwell, of Groton, three hundred twenty-three, - -	323
John G. Palfrey, of Cambridge, one hundred forty-one, - - -	141
The whole number of ballots for lieutenant-governor, eight hundred six,	806
George Grennell, of Greenfield, three hundred forty-four, - - -	344
Henry W. Cushman, of Bernardston, three hundred twenty-one, - -	321
Whole number of ballots for senators, forty-seven hundred sixty-nine,	4769
Charles C. Hazewell, of Concord, four hundred forty-seven, - - -	447
[Here follow the other names and numbers.]	
Whole number of ballots for representatives, eighty hundred thirty-eight, - - - - - - - - - - - - - -	8038
Silas Tyler had three hundred fifty-one, - - - - - - - -	351
[Here follow the other names and numbers]	
The whole number of votes on the question, 'Is it expedient that delegates should be chosen to meet in convention for the purpose of revising or altering the constitution of the government of this commonwealth?' was six hundred and seventy-seven, - - -	677
Yeas, three hundred and eighty, - - - - - - - - -	380
Nays, two hundred and ninety-seven, - - - - - - - -	297

In testimony whereof, and that the foregoing is a true transcript of the record, we, the warden, clerk, and inspectors of elections of said ward, have hereunto set our hands, this tenth day of November, in the year one thousand eight hundred and fifty-one.

WILLARD MINOT, Warden.

OTIS ALLEN,
LEWIS CUTTING, } Inspectors.
JOSEPH S. GRUSH,

ALANSON NICHOLS, Clerk.'

This return, with those received from the other wards, was transcribed by the city clerk into a book kept for that purpose,

and at a meeting of the mayor and aldermen on the 11th of November, was laid before them.

On the 11th of November, the ward officers of the fourth ward, having found that a mistake had been made, in their mode of counting or of stating the whole number of ballots given in for senators and representatives in the ward, prepared and transmitted to the city clerk, to be laid before the mayor and aldermen, the following paper: —

'[B.] We, the undersigned, the warden and inspectors and clerk of ward number four, in the city of Lowell, find on examination two errors made in our record of the whole number of ballots cast in said ward, at the election held on the tenth of November, to wit: In the return of the whole number of ballots cast for senators for the county of Middlesex, being erroneously returned forty-seven hundred and sixty-nine ballots; also, in our return of the whole number of ballots cast in said ward for representatives, being erroneously returned eight thousand and thirty-eight ballots. We therefore correct these two errors, and return the whole number of ballots for senators to the general court was eight hundred and eleven, 811. The whole number of ballots for representatives to the general court was eight hundred and eleven, 811. This correction being in accordance with the truth, and the rest of the original return being correct.

WILLARD MINOT, Warden.

OTIS ALLEN,
JOSEPH S. GRUSH, } Inspectors.
LEWIS CUTTING,

ALANSON NICHOLS, Clerk.'

This paper was on the same day extended upon the record of the ward, by the ward officers, was received by the city clerk before two o'clock, P. M., on the 11th of November, and laid before the mayor and aldermen at their meeting to examine the returns on that day.

A pencil memorandum, made at the time the votes were counted in the fourth ward, was also handed to the mayor and aldermen for their consideration, which contained a statement of the number of votes cast for each person voted for, for the several offices for which an election was held, corresponding to the return actually made, and at the head of it the words, 'Whole number of ballots, 811.'

The number of legal voters in the whole city, according to the lists prepared by the mayor and aldermen for the election, was not so great by some thousands as the number of ballots returned originally as cast for representatives in the fourth ward.

The mayor and aldermen, on the 12th of November, corrected a slight error which had been made in the return from the sixth ward.

The government, in addition to the foregoing facts, offered to prove that the defendants, on the 11th and 12th of November, had access to the original record of the fourth ward, and were offered the testimony, under oath, of the ward officers, and expressed themselves satisfied that the truth was as stated in the paper above given—marked [B].

But it appeared, that in the view of all the facts, the mayor and aldermen decided, that they had no right to go behind the return of the ward officers, refused to examine other evidence or to hear counsel; made up the result of the election on the basis of the whole number of ballots originally stated; declared that there had been no choice of representatives, and thereupon ordered a new election.

Upon this evidence, it was contended for the prosecution, that the defendants had been guilty of wilful neglect of official duty, under the provisions of the 5th chapter of the revised statutes, and of the 22d section of the city charter of Lowell, (stat. 1846, chap. 128,) and were subject to an indictment under the statute of 1848, chapter 240, or at common law.

By the 5th chapter of the revised statutes, the duties of selectmen of towns, in relation to the election of representatives, are prescribed; and by the 8th section it is made the duty of the selectmen, within three days after the election of any representative, 'either by a constable, or some other person thereto specially authorized by them, to give notice of the choice to the representative elected; and that a certificate and return of such election shall be given under the hands of the selectmen present, and shall be delivered into the office of the secretary of the commonwealth; or such election shall be certified to the house of representatives, to their acceptance, on or before the first Wednesday of January in each year.'

The 9th section of the same chapter provides the form of the certificate; the 10th, that the certificate shall have endorsed upon it a return by the constable, or other authorized person, stating

that notice of the election was given to the person chosen; and the 11th section directs that in the city of Boston, the elections shall be conducted according to the act establishing that city, and the acts in addition thereto.

When the revised statutes were enacted, Boston was the only city in the commonwealth; but before the first day of May, 1836, the day on which they took effect, namely, on the first day of April, 1836, the act to establish the city of Lowell was passed.

By the 22d section of the city charter of Lowell, the votes at elections for representatives are to be given at meetings in the several wards. At such meetings, all the votes given in are to be sorted, counted, and declared by the warden and inspectors of elections, and recorded in open ward-meeting by the clerk; and in making such declaration and record, the whole number of votes given in shall be distinctly stated, together with the name of each person voted for, and the number of votes given for each. A transcript of such record, certified by the warden, clerk, and a majority of the inspectors, is to be forthwith transmitted to the city clerk. The city clerk is then directed to enter such returns, or an abstract of them, in a book, as they are received. The mayor and aldermen are then required to meet within two days after the election, and examine and compare all such returns, and make out a certificate of the result of such election, to be signed by a majority of the board of aldermen, and by the city clerk, and to be transmitted, delivered, or returned, in the same manner as the selectmen of towns are required to do with similar returns.

The statute of 1848, chapter 240, enacts, that 'if any selectman, or other city or town officer, shall wilfully neglect or refuse to perform any of the duties required of him by the 5th chapter of the revised statutes,' he shall incur a certain penalty.

Numerous objections were taken by the defendants, some of which were applicable to the whole indictment, and others to particular counts.

To show that no indictment could be sustained under the statute of 1848, it was argued, as that statute imposed a penalty upon city or town officers only, for a wilful neglect or refusal to perform the duties required of them by the 5th chapter of the revised statutes, and as no duties were required by that chapter of the mayor and aldermen of the city of Lowell, the fact, that similar duties were required of them by another statute, could not subject them to the penalty thus expressly limited.

It was further contended, that no indictment could be maintained, at common law, for a simple neglect of official duty, without alleging or proving corruption. Among the objections to the particular counts, the defendants insisted that the duty, which, by the first count, they were charged with violating, was not required of them by any statute.

It is very manifest that the first and third counts cannot be sustained. Without considering objections which depend upon technical reasoning, or tracing the intentions of the legislature through any refined implications, it is enough to observe, that although in these counts the election of the representatives is alleged, and it is also alleged that the defendants wilfully neglected to notify the persons elected, and to make out the certificate of their election; yet there is no allegation in either of these counts, that any returns of the election were made to the mayor and aldermen, or that they ever had any legal evidence, or any evidence whatever, of the fact of the election, or any knowledge, or even information, of who were the representatives elected. Without proof of these facts, or some of them, no duty would devolve upon the mayor and aldermen of the city to cause the notification to be made, or to prepare the certificate; and it would follow, on the most familiar principles of pleading, that, none of these facts being alleged, all the other allegations contained in these counts might be true, and yet the defendants be guilty of no violation of the law.

In regard to the second count, which is drawn with considerable care and skill, and upon which the weight of the prose-

cution was intended and understood chiefly to rest, there are several questions presented, by no means free from difficulty, and which, if it were necessary in the present case to decide them, would deserve the most careful and serious examination.

Whether, by a necessary implication, and reasonable construction of its provisions, the statute of 1848 would include the officers of cities other than the city of Boston, who are charged with duties corresponding to those named in the fifth chapter of the revised statutes; or whether the legislature have so far restricted the terms, as unintentionally to exclude a case clearly within the reason of the statute, and embracing the mischief it was designed to correct; whether a wilful neglect of duty in a public officer, without any corrupt or dishonest purpose, will render him liable to punishment at common law, or whether such liability is limited to those officers whose functions pertain to the administration of public justice; are questions upon which, however important in themselves, it will be unnecessary for the court to express an opinion in this case, because there is one broad ground of defence, which, in our judgment, is entirely decisive. By the 22d section of the city charter, the mayor and aldermen of Lowell are required to meet, within two days after the election held for the choice of governor, representatives and the other officers named therein, and examine and compare all such returns, as shall have been transmitted to the city clerk, according to the previous provisions of the same section, and thereupon to make out a certificate of the result of the election, to be 'transmitted, delivered, or returned,' as in the case of towns. And the same section goes on further to provide, that 'in all elections for representatives to the general court, in case the whole number proposed to be elected shall not be chosen by a majority of the votes legally returned,' the same proceedings are to be had as in the case of a failure to elect by towns. It seems clear from these provisions, that the mayor and aldermen are not constituted a tribunal for the purpose of determining generally the result of the election. They are not required

to examine witnesses, to listen to arguments, or to weigh evidence. They have no judicial function to exercise. They are an intermediate body, upon whom devolves the duty of receiving certain elements from a specified source, compounding them, and transmitting the result, if there appears to be a result which renders farther action unnecessary, to await the final action of a superior power. Their functions are simply ministerial. By the constitution, the house of representatives is the judge of the elections, qualifications, and returns of its own members. By the law, the duty of receiving, sorting, declaring and recording, in open ward-meeting, the votes given by the electors, and of transmitting to the city clerk, for the inspection of the mayor and aldermen, a transcript of the record thus made, is imposed upon the ward officers. The mayor and aldermen are to compare and examine the returns; that is, the papers which are sent to them, verified by the certificate of the ward officers, and purporting to be transcripts of a record, made by the clerk of the ward in open ward-meeting, of the votes which in that meeting had been received, sorted and declared by the warden and inspectors; and, thereupon, that is to say, upon such comparison and examination, not upon the testimony of witnesses, not upon proof of votes given, which were not declared and recorded in open ward-meeting; not upon any certificate which is not and does not purport to be a transcript of the original record; but upon such comparison and examination, to make a certificate of the result, and proceed in conformity with the other requirements of the law.

It then remains to determine, whether the defendants had any such returns laid before them as required them to find, that there had been an election for representatives of the eight persons named in the indictment, so that they should have made a certificate to that effect. It is not questioned, that the returns originally transmitted, including the return from the fourth ward marked [R], upon their face, showed that no choice had been effected; but it was urged on behalf of the prosecution, that there was an apparent and obvious mistake in the original re-

turn from the fourth ward, known to and acknowledged by the defendants, and that an amendment of the return, verified by the same officers who had signed the original return, and in which the mistake was rectified, was seasonably transmitted to them, and should have been received and considered.

The court are of opinion, that the paper marked [B], which is called the amendment of the return, was not a paper which the mayor and aldermen were bound to receive or make the basis of action. It is not, in the first place, in form, a return, such as the statute contemplates, and does not purport to be so. It is not a transcript, verified as a transcript, by the signature of the ward officers, of any record made in open ward-meeting. It merely states, under the signature of the ward officers, that they have discovered a mistake in the record, and have corrected the record, and return the correction accordingly. But the ward officers are not made by the statute certifying officers for any such purposes, or of any such fact. They have a right to copy, certify, and transmit to the mayor and aldermen, the record which was made in open ward-meeting; and these acts of copying, certifying and transmitting, are the only official acts which they have any authority to do, after the ward-meeting has been dissolved.

In the next place, the evidence in the case disclosed no fact inconsistent with the purport of the paper. It was not contended by the prosecution, that in the ward-meeting the whole number of ballots for representatives had been declared and recorded as 811. On the contrary, it was conceded, that the mistake in the mode of counting the ballots occurred at the time the original record was made.

The defendants had therefore a right, and were required by the terms of the law, to determine the result of the election by the authenticated returns of the election before them; and upon these returns they came to a correct conclusion, and were guilty of no neglect, omission, or violation of duty.

But the question is pressed upon the attention of the court, whether, in case of an evident and palpable mistake, there is no power to correct it; and whether, in such a case, a new

election is to be ordered, with all the inconvenience and expense attending it, when it is apparent, that it will be wholly nugatory, and that the first election will be finally held valid by the house of representatives.

The foregoing decision, it will be seen, has no application to the case of an error in the transcript or return, when the original record is correct. It may be admitted, without in any degree impairing the force of the reasoning which we have adopted, that if the ward officers had made a mistake in the paper which they transmitted to the city clerk, by transcribing incorrectly from the record, or by sending the wrong paper, they might, at any time, before the mayor and aldermen had completed their examination, make a correct transcript and send it, with a statement of the error, to that board, and that the mayor and aldermen might be bound to receive and consider it. Such a doctrine would be supported by the view taken of a similar question, by a late judge of the municipal court in Boston, in the case of *Commonwealth* v. *the Mayor and Aldermen of the city of Boston*, Thacher's Criminal Cases, page 298. To reconcile it with the letter of the law, it would only be necessary to give to the word 'forthwith,' the meaning of 'within such time as may be requisite for conveniently and correctly copying the record, not extending beyond the time prescribed for the mayor and aldermen to make their examination.'

It is scarcely within the province of this court, to express an opinion upon the question, whether in a case of clear mistake, where the error was obvious, and the truth of the fact ascertained beyond all controversy, it would be well for public officers to 'take the responsibility,' (as it is termed in the popular phrase,) of stepping beyond the bounds of legal requirement, and correcting the error, when it could be done without prejudicing the right of any one, and where it would promote the convenience of all. It is enough for us to say, that no officer is liable to indictment for refusing to assume so questionable an authority. Such a departure from the express provisions of the statute could be justified only by its success. If the

house of representatives should sustain the result arrived at in such a case, it would perhaps be unobjectionable; but the act would derive its whole efficacy from the subsequent approval and confirmation, and not from any legal validity of its own. In the military service, the officer who disobeys his instructions may escape censure, or sometimes receive commendation, when some brilliant success achieved, or some great disaster averted, has seemed to atone for, if not to justify, his disobedience; but he is surely not to be cashiered, when he has fully and faithfully executed the lawful commands of his superiors. If the servant follows the direction of his master, even when it might have been advantageous to deviate from his instructions, it is no breach of contract. Except in a very clear case, to leave the course pointed out by the laws of the commonwealth for ascertaining the result of an election, in order to exercise a discretion which those laws have not recognized, is certainly dangerous; to refuse to do so can in no case be criminal.

Since this indictment was found, the legislature have made some further statutory provisions upon the subject. (Statutes of 1852, chapters 209, and 282.) While in one statute, directions are given for the amendment, by the mayor and aldermen of any city, of errors in the form of the return, in the other (chap. 282), the important principle of allowing no tribunal, inferior to that which is made by the constitution the final judge of the election of its members, to certify a result of an election different from the one declared and recorded in the public meeting of the citizens, is adhered to and enforced.

This case was taken from the jury by consent, upon an intimation from the court of an opinion substantially like that which has now been announced; and in which, after full consideration, six of the justices of this court (being all who have had an opportunity to examine it) fully concur.

It should perhaps be stated, in justice to the defendants, that they did not go into any defence before the jury, and were only heard upon the questions of law arising upon the case as presented for the prosecution.

Upon the view which we have taken of the law, a *nolle prosequi* must be entered by the district attorney, or a jury impanelled anew, and a verdict taken for the defendants."

STATUTES OF THE COMMONWEALTH, RESPECTING ELECTIONS, IN FORCE PREVIOUS TO THE REVISED STATUTES, AND SUPERSEDED BY THE LATTER.

1780, Chap. 26.

An act empowering selectmen to call town-meetings for the choice of representatives.

SECT. 1. Selectmen to call town-meetings for the choice of representatives annually; to preside therein, and to make return to the secretary's office. Form of return.
SECT. 2. Penalty for neglect of duty.

WHEREAS by the constitution or frame of government of this commonwealth, chapter first, section third, article fifth, it is declared, "That the members of the house of representatives shall be chosen annually, in the month of May, ten days at least before the last Wednesday of that month; but no provision is made for convening the voters, for regulating the meetings, or of making returns of the persons elected:

SECT. 1. *Be it therefore enacted by the senate and house of representatives, in general court assembled, and by the authority of the same*, That the selectmen for the time being, or the major part of them, in each and every town, authorized to choose a representative in this commonwealth, be, and they are hereby empowered and directed to cause the inhabitants of their towns respectively, qualified according to the constitution, to be annually warned in due course of law, to meet at such time and place as they shall appoint (being ten days at least before the said last Wednesday in May) for the purpose of choosing one or more representatives agreeable to said constitution; and said selectmen shall preside at and regulate said meeting, and cause the person or persons so chosen by the major part of the voters present, to be notified of said choice, as soon

as may be, by a constable of said town, and they shall make return thereof into the secretary's office on or before the said last Wednesday in May annually, in form following, viz.:—

Pursuant to a law of this commonwealth, the freeholders and other inhabitants of the town of ——— qualified according to the constitution, upon due warning given, met together the ——— day of ——— and then did elect ——— to represent them in the general court appointed to be convened and held for the government's service at the state house, in Boston, or such other place as may hereafter be appointed for the general court to convene at, agreeable to the constitution, upon the last Wednesday of May, the said person being chosen by the major part of the electors present at said meeting. Dated in ——— aforesaid, the ——— day of ———, in the year of our Lord, ——— and in the ——— year of the independence of the United States of America.

} Selectmen of ———.

The person chosen as aforesaid was notified thereof and summoned to attend by me,

———, Constable of ———.

Sect. 2. *Be it further enacted*, That any selectman or constable, neglecting his duty as herein described, or any part thereof, shall, for each neglect, forfeit and pay the sum of ten pounds, to be recovered in an action of debt before any court proper to try the same; which sum shall be for the benefit of the person suing for the same. [*April* 20, 1781.]

[This statute was repealed, Feb. 24, 1796, by st. 1795, c. 55.]

1785, Chap. 75, §§ 5, 6.

An act for regulating towns, setting forth their powers, and for the choice of town officers, and for repealing all laws heretofore made for that purpose.

SECT. 5. Manner of calling town-meetings. Nothing to be acted upon, unless inserted in the warrant. Justice of the peace to call meeting, if selectmen refuse.

SECT. 6. Town-meetings regulated. Moderator's power. Proviso. Moderator to swear clerk, if no justice is present.

SECT. 5. *And be it further enacted by the authority aforesaid*, That when there shall be occasion of a town-meeting, the constable or constables, or such other person as shall be appointed for the purpose, by warrant from the selectmen, or the major part of them, shall summon and notify the inhabitants of such town to assemble at such time and place, in the same town, as the selectmen shall order, the manner of summoning the inhabitants to be such as the town shall agree upon; and when ten or more of the freeholders of a town shall signify, in writing, their desire to have any matter or thing inserted in a warrant for calling a meeting, the selectmen are hereby required to insert the same in the next warrant they shall issue for a meeting, or call a meeting for the express purpose of considering thereof; and no matter or thing shall be acted upon, in such a manner as to have any legal operation whatever, unless the subject matter thereof be inserted in the warrant for calling the meeting; and in case the selectmen shall unreasonably deny to call a meeting upon any public occasion, any ten or more of the freeholders of such town may apply to a justice of the peace within and for the same county, who is hereby authorized and empowered to issue his warrant, under his hand and seal, directed to the constable or constables of the town, if any such there be, otherwise to any of the freeholders applying therefor, directing him or them to notify and warn the inhabitants, qualified to vote in town affairs, to assemble at such time and place, in the same town, as the said justice shall in his said warrant direct, and for the purpose in the same warrant ex-

pressed. And when by reason of death, removal or resignation of selectmen, a major part of the number originally chosen shall not remain in office within any town; in every such case, a major part of the survivors, or of such as remain in office, shall have the same power to call a town-meeting as a major part of the whole number first chosen.

SECT. 6. *And be it further enacted by the authority aforesaid*, That at every town-meeting, a moderator shall be first chosen by a majority of votes, who shall be thereby empowered to manage and regulate the business of the meeting; and when a vote, declared by the moderator, shall, immediately after such declaration, be scrupled or questioned by seven or more of the voters present, the moderator shall make the vote certain, by polling the voters, or such other way, as the meeting shall desire. And no person shall speak in the meeting, before leave first had and obtained from the moderator, nor when any other person is orderly speaking; and all persons shall be silent at the desire of the moderator, on pain of forfeiting five shillings for the breach of every such order, to the use of the town; and if any person shall, after notice from the moderator, persist in his disorderly behavior, then it shall be lawful for the moderator to direct such disorderly person to withdraw from the meeting; and such disorderly person, upon his refusal or neglect to withdraw, shall forfeit and pay a fine of twenty shillings, to the use of the same town; and may also, by direction of the moderator, be carried out of the meeting by some constable of said town, and put into the stocks, cage, or some other place of confinement, and there be detained for the space of three hours, unless the town-meeting shall sooner adjourn or dissolve. And all suits and informations for fines incurred by a breach of this act, not exceeding forty shillings, may be heard and determined before any justice of the peace, in the same county, not an inhabitant of the same town, unto whom the penalty or any part thereof is given, who, upon conviction, may enforce the payment thereof by a similar process, as is herein prescribed in the court of general sessions of the peace for persons who refuse to serve in the office of constable. *Provided, always,*

that town-meetings for the choice of governor, lieutenant-governor, and senators, shall be regulated as the constitution directs, and for the choice of representatives as is otherwise by law prescribed; anything in this act contained to the contrary notwithstanding. And the moderator of any town-meeting, chosen as aforesaid, is hereby authorized, in case no justice of the peace be present, to administer to the clerk, in open town-meeting, the oath by law prescribed to the same office. [*March* 23, 1786.]

1787, Chap. 40.

An act to prevent neglect in sheriffs, selectmen, and town clerks, respectively, in not calling and presiding at town-meetings, receiving and returning the votes for governor, lieutenant-governor, senators, and counsellors, as is pointed out by the constitution of this commonwealth.

SECT. 1. Penalty for neglect of duty in sheriffs.
SECT. 2. Penalty for neglect in selectmen and town clerk.
SECT. 3. How recovered, &c.

WHEREAS certain duties are by the constitution of the commonwealth required of the sheriffs, selectmen, and town clerks, respectively, in calling and presiding at town-meetings for the choice of governor, lieutenant-governor, senators and counsellors, and in receiving and returning the votes for such officers into the secretary's office, but no penalty is by law provided, where the sheriffs, selectmen, and town clerks shall and do neglect or refuse to perform the duties respectively required of them by the constitution:—

SECT. 1. *Be it therefore enacted by the senate and house of representatives, in general court assembled, and by the authority of the same,* That the sheriff of any county, who shall neglect or refuse to make seasonable return, agreeably to the constitution, into the secretary's office of this commonwealth, of all such votes for governor, lieutenant-governor, senators, and counsellors, as he shall receive, or shall otherwise neglect his

duty in the premises, shall for each and every offence forfeit and pay the sum of fifty pounds.

SECT. 2. *And be it further enacted*, That each and every selectman and town clerk, who shall neglect and refuse to do and perform the several duties required of them by the constitution, respecting the choice of governor, lieutenant-governor, senators, and counsellors, and returning the votes for the same, shall, for each and every offence, forfeit and pay the sum of ten pounds.

SECT. 3. *And be it further enacted by the authority aforesaid*, That it shall be the duty of the attorney-general to sue for and recover all such fines and forfeitures, as shall be incurred by a breach of this act, for the use of this commonwealth.

[This act was repealed, Feb. 24, 1796, by st. 1795, c. 55.]

1795, Chap. 55.

An act for regulating elections.

SECT. 1. Time of meeting for choice of representatives. Duty of selectmen. Certificate of return. Penalty.
SECT. 2. Penalty, if selectmen neglect to call or preside at meetings; for neglect of clerk to record, or to return, votes.
SECT. 3. Powers of selectmen and assessors presiding. To prevent unqualified persons from voting.
SECT. 4. Penalty for voting more than once, and for being disorderly.
SECT. 5. Forfeiture of sheriff for not returning votes.
SECT. 6. Forfeitures,—how to be recovered.
SECT. 7. Acts repealed. Proviso.

SECT. 1. *Be it enacted by the senate and house of representatives, in general court assembled, and by the authority of the same*, That the inhabitants of every corporate town, having a right to choose a representative or representatives in the legislature of this commonwealth, shall be convened for that purpose annually in the month of May, ten days at least before the last Wednesday of the same month, by the selectmen of such town or the major part of them: And it shall be the duty of such selectmen, to summon and notify such meeting in the manner there legally established for calling other town-meetings; and the selectmen present shall preside in such meeting, and shall regulate the same, and shall openly receive,

sort and count the written votes which shall there be given by the inhabitants present, qualified to vote for representatives; and shall forthwith publicly declare who is or are the person or persons elected; and shall cause the election to be recorded on the town records, together with the whole number of votes given in, and for whom they were given; and shall cause the person or persons so elected, to be notified thereof by a constable of the town, or any other person specially authorized for that purpose by the selectmen, within three days next afterwards; and the selectmen present, or the major part of them, shall make and sign a certificate and return of such election, and shall cause the same to be delivered into the office of the secretary of the commonwealth, on or before the last Wednesday of the same month; or such election shall be certified to the house of representatives to their acceptance; and such certificate may be in the form following, viz:—

COMMONWEALTH OF MASSACHUSETTS.

County of

Pursuant to a law of this commonwealth, the freeholders and other inhabitants of the town of , qualified according to the constitution, having been duly convened in town-meeting, on the day of May current, for the choice of representatives in the legislature of this commonwealth, did then and there elect A. B., being an inhabitant of said town, to represent them in the general court, to be convened and holden on the last Wednesday of the same month. Dated at the day of in the year of our Lord 179 , and in the year of the independence of the United States.

Selectmen of

The person chosen as aforesaid was notified thereof, and summoned to attend, by me , Constable of

And where the selectmen of any town entitled to choose a representative, as aforesaid, shall neglect to notify a meeting, or to preside or proceed therein as by this act is required; and where any town-clerk shall refuse or neglect his duty therein,

to the prejudice of the rights of the electors, each and every selectman, and the town-clerk so offending therein, shall respectively forfeit a sum not exceeding eighty dollars, nor less than forty dollars, according to the aggravation of the offence, upon conviction thereof.

Sect. 2. *And be it further enacted*, That the selectmen of any corporate town or district, and the assessors of any unincorporated plantation, in the several counties of this commonwealth, who shall neglect to call meetings of the inhabitants and others privileged there to vote for the election of governor, lieutenant-governor, counsellors and senators, and to give due warning of the time and place of such meetings, as required by the constitution of this commonwealth, or who shall refuse or neglect to preside in any such meetings, or to receive the votes of the qualified electors present, or who shall neglect to ascertain, declare and certify the number of votes, or who shall wilfully make any false declaration or certificate thereof, to the prejudice of the rights of the electors, shall forfeit a sum not exceeding eighty dollars, nor less than forty dollars, to be recovered from each selectman or assessor who shall offend in the premises, according to the aggravation of each offence. And every town clerk, and the clerk or assessors of any unincorporated plantation, present at any such meeting, who shall neglect or refuse to make a fair record of the votes, or a fair copy of such record, or to attest the same, or who shall refuse or neglect to make due and seasonable return thereof to the sheriff of the county, or into the secretary's office, as required by the constitution of this commonwealth, shall forfeit a sum not exceeding eighty dollars, nor less than forty dollars, for each offence.

Sect. 3. *And be it further enacted*, That the selectmen and assessors, authorized and required to preside in any meeting of a town or plantation which shall be convened for the election of governor, lieutenant-governor, counsellors and senators, electors of the president of the United States, representatives in congress, or representatives in the legislature of this commonwealth, shall have all the powers which are legally vested

in the moderator of town-meetings for the regulation thereof. And in such meetings, the selectmen or assessors presiding shall have power, and it shall be their duty, to prevent and refuse the vote of any person not qualified to be an elector, whose qualifications shall be determined according to the constitution of this commonwealth, or the constitution of the United States, as the case may be.

Sect. 4. *And be it further enacted*, That any elector who shall give in more than one vote at any one election, and any person who shall be disorderly in any such meeting, shall forfeit a sum not exceeding twenty dollars, nor less than ten dollars, according to the difference and aggravation of each offence.

Sect. 5. *And be it further enacted*, That if any sheriff, when required by law to make return to the secretary's office, of the votes of the towns and plantations or districts in their several precincts, for any election as aforesaid, shall neglect to make such return within the time prescribed, he shall forfeit and pay a sum not exceeding five hundred dollars, nor less than fifty dollars, for each offence.

Sect. 6. *And be it further enacted*, That all forfeitures, incurred by any breach of this act, may be recovered by indictment, or by action of debt, in the name and to the use of the commonwealth, to be found or brought in any court proper to try the same.

Sect. 7. *And be it further enacted*, That an act passed in April, in the year of our Lord one thousand seven hundred and eighty-one, entitled, "An act empowering the selectmen to call town-meetings for the choice of representatives;" and an act, passed March eighteenth, one thousand seven hundred and eighty-eight, entitled, "An act to prevent neglect in sheriffs, selectmen and town clerks, respectively, in not calling and presiding at town-meetings, receiving and returning the votes for governor, lieutenant-governor, senators and counsellors, as is pointed out by the constitution of this commonwealth," be, and the same are hereby repealed: *Provided, however*, That the said acts shall continue and be in force for

the recovery of any penalties or forfeitures already incurred by any person for the breach thereof. [*Feb.* 24, 1796.]

1798, Chap. 31.

An act in addition to the several laws regulating elections.

SECT. 1. No meeting to be held on days of military duty.
SECT. 2. Military duty not to be required on days of voting for civil officers.
SECT. 3. Votes to be personally presented.
SECT. 4. Recovery and disposal of fines.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same*, That it shall not be lawful for the selectmen of any town or district to appoint a meeting for the election of a representative to the general court, on any day on which by law the militia of this commonwealth are specially required to do military duty; and the selectmen, thus appointing any such meeting, shall severally forfeit and pay a sum not exceeding one hundred dollars.

SECT. 2. *Be it further enacted*, That no officer or soldier of the militia shall be holden to do any military duty on any day, (except on days which are or may be specially prescribed by law,) on which the selectmen or assessors of any town or district shall appoint a meeting for the election of a representative to the general court, or on the day pointed out in the constitution for the election of governor, lieutenant-governor and senators of this commonwealth, or on any day which is or may be appointed for the choice of electors of president and vice-president of the United States, or representatives to congress: and it shall not be lawful for any such officer to exercise any military command on either of said days, unless in case of sudden invasion made or threatened, or in obedience to the orders of the commander-in-chief, except as is herein before excepted; and every officer offending herein shall, for each offence, forfeit and pay a sum not less than ten nor more than three hundred dollars.

SECT. 3. *Be it further enacted*, That it shall not be lawful for the selectmen or assessors of any town, district or plantation, presiding at a meeting for either of the elections aforesaid, to receive any vote, unless delivered in writing by the voter in person, and the selectmen or assessors, who shall offend herein, shall severally forfeit and pay a sum not exceeding one hundred dollars.

SECT. 4. *Be it further enacted*, That all fines and forfeitures, for any breach of this act, may be recovered by indictment before the supreme judicial court, or by action of debt before any court proper to try the same, one-half to the use of this commonwealth, and the other half to the use of any person who shall prosecute or sue for the same. [*June* 29, 1798.]

1800, Chap. 74.

An act in addition to the several acts for regulating elections.

SECT. 1. Assessors to make out a list, annually, of qualified voters. Lists to be published. Selectmen to sit to receive evidence of qualification.
SECT. 2. Senators to be voted for on one list.
SECT. 3. Penalty for giving more than one vote.
SECT. 4. No person to vote until permitted by selectmen.
SECT. 5. Penalty for negligence of selectmen.
SECT. 6. Recovery of fines.
SECT. 7. When to take effect.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same*, That it shall be the duty of the assessors of each town and district within this commonwealth, on or before the first day of March, annually, to make out, and deliver to the selectmen thereof, a correct and alphabetical list of all such inhabitants of their respective towns or districts, as shall appear to them qualified, by the constitution of this commonwealth, or of the United States, respectively, to vote for governor, lieutenant-governor, senators, representatives in the general court, or representatives in congress; which list it shall be the duty of such town or district, at any time within ten days then next following, to revise and correct, as to them shall appear necessary, so that the same shall, in their opinion,

be a complete list of such of the inhabitants within their respective towns or districts, as shall be constitutionally qualified to vote in the elections aforesaid. And the assessors of every plantation are alike required to furnish themselves with like lists, on or before the tenth day of March, annually; and it shall be the duty of the selectmen of the several towns and districts, and the assessors of plantations aforesaid, respectively, to publish the said lists within their respective towns, districts or plantations, by causing true copies thereof to be posted up at two or more public places in such towns, districts or plantations, fourteen days at least before the first Monday in April, annually; and it shall also be the duty of the selectmen of such towns or districts, and the assessors of such plantations, to be provided with, and have a complete list as aforesaid, at every meeting for the choice of governor, lieutenant-governor, senators, representatives of the general court, or representatives of congress; which list shall at all times be so corrected, previous to the opening any such meeting, as to represent the qualified voters for the particular election then to be made; and no such meeting shall be opened at an earlier hour than eleven of the clock in the forenoon of the day of election; and it shall be the duty of such selectmen or assessors to be in session, at some convenient place, immediately preceding such meeting, for so long time as they shall judge necessary, to receive evidence of the qualifications of persons, whose names have not been entered on the list published as aforesaid; and of the time and place of such meeting, public notice shall be given at the time the lists are published as aforesaid.

[This section was repealed, March 7, 1803, by st. 1802, c. 116.]

Sect. 2. *Be it further enacted*, That whenever a meeting is holden in any town or place, for the purpose of choosing persons for counsellors and senators, the selectmen or assessors presiding at such meeting be and hereby are directed to call on the voters in such meeting, qualified for choosing such officers, requiring each of them to give in their votes on one list

for as many different persons as are then to be chosen to the same office.

SECT. 3. *Be it further enacted*, That if any person, at any meeting for an election for any of the officers aforesaid, shall knowingly and designedly give in more than one vote or list, at any one time of balloting at any such election, he shall, in addition to the fine already provided by law, against any elector giving more than one vote in any election, forfeit and pay a fine not exceeding thirty dollars.

SECT. 4. *Be it further enacted*, That no person shall be permitted to give in his vote at any meeting of a town, district or plantation, holden for an election to any of the offices aforesaid, until the selectmen of such town or district, or the assessors of such plantation, presiding at such election, shall have had opportunity to inquire his name, and found the same in the list aforesaid; and any person wilfully voting contrary to the provision of this act, or who shall give any false answer to such selectmen or assessor, being duly thereof convicted, shall forfeit and pay a fine not exceeding twenty dollars for each and every offence, according to the nature and aggravation thereof.

SECT. 5. *Be it further enacted*, That if any selectman or assessor of any town or district, or the assessor of any plantation, shall knowingly and corruptly neglect, or refuse to comply with or to perform, the several duties respectively required of him or them, as pointed out in and by this act, he shall, for each and every such offence, forfeit and pay a fine not exceeding fifty dollars, according to the nature and aggravation thereof.

SECT. 6. *Be it further enacted*, That all fines and forfeitures, for any breach of this act, may be recovered by indictment before the supreme judicial court, or by action of debt before any court proper to hear and determine the same; one-half to the use of this commonwealth, and the other half to the use of any person who shall prosecute or sue for the same.

SECT. 7. *And be it further enacted*, That this act shall be in force from and after the first day of July next. [*March* 7, 1801.]

1802, Chap. 116.

An act in addition to an act, entitled "An act in addition to the several acts for regulating elections," and for repealing the first section of said act.

SECT. 1. Assessors to make out a list of qualified voters. The list to be published. Selectmen to be in session, previous to an election, to complete the list.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same*, That it shall be the duty of the assessors [and assistant assessors 1809, c. 127] of each town and district within this commonwealth, on or before the first day of March, annually, to make out and deliver to the selectmen thereof a correct and alphabetical list of all such inhabitants of their respective towns or districts, as shall appear to them qualified by the constitution of this commonwealth or of the United States, respectively, to vote for governor, lieutenant-governor, senators, representatives in the general court or in congress; which list it shall be the duty of the selectmen of such town or district, at some time within ten days then next following, to revise and correct, as to them shall appear necessary, so that the same shall, in their opinion, be a complete list of such of the inhabitants within their respective towns or districts, as shall be constitutionally qualified to vote in the elections aforesaid; and the assessors of every plantation are alike required to furnish themselves with like lists, on or before the tenth day of March annually; and it shall be the duty of the selectmen of the several towns and districts, and the assessors of plantations aforesaid, respectively, to publish the said lists within their respective towns, districts or plantations, by causing true copies thereof to be posted up at two or more public places in such towns, districts or plantations, fourteen days at least before the

first Monday in April annually; and it shall also be the duty of the selectmen of such towns or districts, and the assessors of such plantations, to be provided with, and have a complete list as aforesaid, at every meeting for the choice of governor, lieutenant-governor, senators, representatives in the general court or in congress; which list shall be so corrected, previous to the opening of any such meeting, as to contain all the qualified voters for the particular election then to be made; and no such meeting shall be opened at an earlier hour than eleven of the clock, [except where the qualified voters exceed 500, 1804, c. 117,] of the forenoon of the day of election; and it shall be the duty of such selectmen or assessors to be in session at some convenient place, immediately preceding such meeting, for so long time as they shall judge necessary, to receive evidence of the qualifications of persons, whose names have not been entered on the list published as aforesaid, and to give public notice of the time and place of such meeting, when they publish the said lists as before directed.

SECT. 2. *And be it further enacted*, That the first section of the act, to which this is an addition, be, and the same hereby is repealed. [*March* 7, 1803.]

[This act was repealed Feb. 11, 1823, by st. 1822, c. 104.]

1804, Chap. 117.

An act in addition to an act, entitled "An act in addition to an act, entitled an act in addition to the several acts for regulating elections, and for repealing the first section of said act."

SECT. 1. Town-meetings may be opened earlier than eleven o'clock, where voters exceed five hundred.

SECT. 2. Where voters exceed one thousand, selectmen to sit to receive evidence of their qualifications, one day at least before the meeting.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same*, That any meeting mentioned in the first section of the act, entitled, "An act in addition to an act, entitled an act in addition to the several acts for regulatingel ections, and

for repealing the first section of said act," passed March the seventh, one thousand eight hundred and three, in any town where the number of qualified voters shall exceed five hundred, may be opened at an earlier hour than eleven of the clock in the forenoon of the day of election, at the discretion of the selectmen of such town, anything in said act to the contrary notwithstanding.

SECT. 2. *And be it further enacted*, That in any town, where the number of qualified voters shall exceed one thousand, it shall be the duty of the selectmen of such town to be in session at some convenient place, on the day immediately preceding such meeting; and when this shall happen on Sunday, then on the Saturday immediately preceding such meeting, and for a time as much longer, previous to said day, as they shall judge necessary, to receive the evidence of the qualifications of persons mentioned in the first section of the act to which this is an addition. [*March* 15, 1805.]

1806, Chap. 26.

An act in addition to the several acts regulating elections.[1]

SECT. 1. Duty of selectmen, clerks and assessors, respecting votes for governor and lieutenant-governor. Secretary to preserve the seals entire.
SECT. 2. Duty of selectmen, &c. respecting votes for counsellors and senators. Seals to remain unbroken until delivered to authority.
SECT. 3. Duty of secretary respecting returns of votes for representatives in congress.
SECT. 4. Selectmen and assessors to be sworn to faithful discharge of their duty respecting elections and the returns thereof.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of*

[1] The above act or bill was, on the day of its date, laid before the governor for his revisal, who did not signify his approbation by signing the same. On the same day the general court was adjourned by the governor, at the concurrent request of the two houses, and with the advice of council, to the first Wednesday of January, A. D. 1807. It assembled on that day accordingly; and on the next day, his excellency returned the said bill, together with his objections thereto, in writing, to the house of representatives, in which the bill originated. The house, having ordered the said objections to be entered at large on their records, did not proceed to reconsider said bill, but on the 22d day of January passed the following resolve:—

"Whereas it is provided by the constitution of this commonwealth, that if any bill

the same, That it shall hereafter be the duty of the selectmen, and of the town or district clerks, in the several towns or districts within this commonwealth, and of the assessors of plantations, which are entitled by the constitution to the privilege of voting for governor and lieutenant-governor, and for senators and counsellors for their respective districts, to make and seal up a separate list of the persons voted for as governor and lieutenant-governor, in the several towns, districts, or plantations, and transmit the same to the secretary of the commonwealth, or to the sheriffs of their respective counties, according to the provisions of the constitution. And when the said lists shall be received at the office of the secretary, the seals thereof shall not be broken, but the same shall be safely kept entire, as they were received, until delivered by him to the two branches of the general court, at the commencement of their next session, to be by them examined agreeably to the constitution.

SECT. 2. *Be it further enacted*, That it shall further be the duty of the several selectmen, clerks and assessors aforesaid, to make and seal up a separate list of the persons voted for as counsellors and senators, in the several towns, districts and plantations, and transmit the same to the secretary of the commonwealth, or to the sheriffs of their respective counties, according to the provisions of the constitution. And when the said lists shall be received at the office of the secretary, the seals thereof shall not be broken, but the same shall be safely kept entire, as they were received, until delivered by him to the governor and council, or to the executive authority of the commonwealth, for the time being, to be by them examined agreeably to the constitution.

or resolve, which shall have passed the two branches of the legislature, shall not be returned by the governor to that branch in which it originated, within five days after it shall have been presented to him for revisal, the same shall have the force of a law:

Resolved, as the sense of this house, that the bill entitled, An act, in addition to the several acts regulating elections, as likewise a resolve for carrying into effect the provisions of the aforesaid bill, not having been returned to this house by his excellency the governor within the time prescribed by the constitution, is not regularly before the house, and that no further order be taken thereon."

See 3 Mass. Rep. 567; Amendments to the Constitution, Art. I.

SECT. 3. *Be it further enacted*, That when the returns of votes from the several towns, districts and plantations, within this commonwealth, for representatives in congress for their several districts, shall be received in the secretary's office, the seals thereof shall not be broken, but the same shall be safely kept entire, as they were received, until delivered by him to the governor and council, or to the executive authority of the commonwealth, for the time being, to be by them examined agreeably to the law.

SECT. 4. *Be it further enacted*, That the selectmen of the several towns and districts, and the assessors of the several unincorporated plantations, as aforesaid, shall hereafter, before entering on the execution of their respective offices, take an oath, or if they have conscientious scruples, an affirmation, according to law, before some justice of the peace, or the clerk of the town, district or plantation, whereof they are selectmen or assessors, faithfully and impartially to discharge the duties of their office respecting all elections, and the returns thereof; and a certificate of said oath or affirmation shall be recorded in the record of such town, district or plantation accordingly. [*June* 24, 1806.]

[This act was repealed March 13, 1833, by st. 1833, c. 141.]

1809, Chap. 127.

An act in addition to the several laws regulating elections.

Assistant assessors to make lists of voters, &c.

Be it enacted by the senate and house of representatives, in general court assembled, and by the authority of the same, That the assistant assessors, in any town wherein such officers are or may by law be chosen, shall, before entering on the duties of their respective offices, be sworn to the faithful discharge thereof, and shall have the same powers, and they are hereby required to perform the same duties, in their several wards, in collecting and making lists of all such inhabitants

as are qualified to vote in any election, and also of all ratable polls, as assessors are by law required to do and perform. [*March* 6, 1810.]

1811, Chap. 9.

An act regulating the choice of town officers and town-meetings.

SECT. 1. Qualifications of voters. Proviso.
SECT. 2. Elections of certain officers to be by ballot.
SECT. 3. Ballots not to be examined until the close of the poll.
SECT. 4. Repealing clause.

SECT. 1. *Be it, enacted by the senate and house of representatives, in general court assembled, and by the authority of the same*, That every male citizen of this commonwealth, of twenty-one years of age and upwards, liable to be taxed, who has resided within any town, plantation or district for one year next preceding his voting, shall be entitled to vote in such town, district or plantation, in the election of all town officers: *Provided, however*, That no person shall be entitled to vote who is supported as a pauper; and every citizen as aforesaid, who has resided within any town, district or plantation, for one year as aforesaid, and during said term has been taxed for his poll, or any estate in any tax voted to be raised by said town, district, or plantation, shall be entitled to vote in all other town affairs.

[This section was repealed, Feb. 11, 1823, by st. 1822, c. 104.]

SECT. 2. *Be it further enacted*, That the election of moderator of all town-meetings, for the choice of town officers (excepting in the town of Boston), of town clerks, selectmen, and assessors, shall be by written ballots, and during the election of the moderator for any town-meeting, the town clerk shall preside, and shall have all the powers and do all the duties, which the moderator of a town-meeting now by law has and does perform.

SECT. 3. *Be it further enacted*, That if the moderator or selectmen presiding at any town-meeting, without the consent of the voter, shall read or examine, or permit any other person to read or examine the name or names written on his ballot

or ticket, with a view to ascertain the name of the candidate voted for, before the poll is closed, the moderator, selectmen, or selectman, so offending, shall each of them on conviction forfeit and pay to the use of such town the sum of twenty dollars, to be recovered by indictment in any court proper to try the same.

SECT. 4. *Be it further enacted*, That all parts of any acts, inconsistent with this act, be, and the same are hereby repealed. [*June* 18, 1811.]

1812, Chap. 135.

An act to prevent towns from choosing and returning more than their constitutional number of representatives.

SECT. 1. Penalty for returning more representatives than the constitution warrants.
SECT. 2. Fines, how recovered.
SECT. 3. Where inhabitants of Boston and Nantucket may be prosecuted.

SECT. 1. *Be it enacted by the senate and house of representatives, in general court assembled, and by the authority of the same*, That every town in this commonwealth, which shall in any year choose and return a representative to the house of representatives in the general court, when it shall not be constitutionally entitled to a representative; and every town in this commonwealth, which shall in any year elect and return, to the house of representatives in the general court, a greater number of representatives than such towns shall be constitutionally entitled to, shall forfeit and pay a sum not less than one hundred dollars, nor more than three thousand dollars, at the discretion of the court before whom the conviction may be had, for each and every such representative so unconstitutionally elected and returned.

SECT. 2. *Be it further enacted*, That the fines and forfeitures mentioned in this act shall and may be recovered by information or indictment, before the supreme judicial court, circuit court of common pleas, or court of common pleas for the

county of Dukes county, holden in and for the counties respectively, in which any town may be, incurring the penalties of this act; one-half whereof shall enure to the use of the complainant who shall prosecute therefor, and the other to the use of the commonwealth.

SECT. 3. *Be it further enacted*, That every and all penalties, fines and forfeitures, which may accrue by virtue of any breach of this act, in the town of Boston, in the county of Suffolk, shall be prosecuted as aforesaid, either before the supreme judicial court, or circuit court of common pleas, to be holden in and for the county of Middlesex; and every and all penalties, fines and forfeitures, which may accrue by means of any breach of this act, in the town of Nantucket, shall and may be prosecuted as aforesaid, either before the supreme judicial court, or circuit court of common pleas, to be holden in the county of Suffolk. [*Feb.* 27, 1813.]

1813, Chap. 68.

An act more effectually to secure the rights of suffrage.

SECT. 1. Assessors to make list of qualified voters for town officers, and post it. To be in session on the day before the annual meeting, to receive evidence of voters' qualifications.
SECT. 2. Fine for more than one vote.
SECT. 3. Penalty for persons voting who are unqualified.
SECT. 4. Penalty for voting until moderator has time to inquire, and to check the name on the list; for giving false answers.
SECT. 5. Penalty for neglect in selectmen and assessors. Fines, how recovered.
SECT. 6. Who may vote respecting the number of representatives.

SECT. 1. *Be it enacted by the senate and house of representatives, in general court assembled, and by the authority of the same*, That it shall be the duty of the assessors of each town and district within this commonwealth, on or before the twentieth day of February annually, to make out a correct and alphabetical list of all such inhabitants of their respective towns and districts, as may be qualified by law to vote in the choice of town officers; which lists shall be published within the respective towns and districts, by posting up true copies thereof, at two or more public places, seven days at least before

the first day of March annually. And it shall be the duty of said assessors to be in session at some convenient place, to be by them notified on said lists, on the day next preceding the day of the annual election of town officers, in the month of March or April annually, unless the same happen on the Lord's day, in which case the assessors shall be in session on the Saturday preceding, or on the morning of the day of election as aforesaid, as the assessors think proper, for so long time as they shall judge necessary, to receive evidence of the qualifications of persons whose names have not been entered on said lists.

[This section was repealed, Feb. 11, 1823, by st. 1822, c. 104.]

SECT. 2. *Be it further enacted*, That if any person, at any meeting for the choice of town officers, shall knowingly give in more than one vote or list, for any officer or list of officers then voted for at any such meeting, he shall forfeit and pay a fine not exceeding one hundred dollars.

SECT. 3. *Be it further enacted*, That if any person, knowing himself to be not legally qualified to vote at any meeting for the choice of town officers, or at any meeting for the choice of governor, lieutenant-governor, senators and councillors, representatives to the general court, or representatives to congress, shall wilfully give in, or attempt to give in a vote or ballot for any of the same then voted for, at any such meeting, every such person, so offending, shall forfeit and pay a fine therefor, not exceeding the sum of fifty dollars; and any person who shall wilfully aid or abet any person, not legally qualified as aforesaid, in voting, or attempting to vote, contrary to the provisions of this act, shall forfeit and pay a fine not exceeding thirty dollars for each and every such offence.

SECT. 4. *Be it further enacted*, That no person shall be permitted to give in his vote or ballot, at any meeting for the choice of town officers, or other officers as aforesaid, until the person presiding at such meeting shall have had opportunity to inquire his name, and shall have ascertained that the same is in the list aforesaid, and shall have had time to check the same; and any person wilfully voting contrary to the provi-

sions of this act, or who shall give any false answer or false name to the assessors, when receiving evidence of the qualifications as aforesaid, or to the person presiding in such town or district meeting, shall forfeit and pay a fine, not exceeding thirty dollars, for each and every such offence.

SECT. 5. *Be it further enacted*, That the selectmen or assessors of any town or district aforesaid, who shall refuse or neglect to do and perform all or any of the duties prescribed to them by this act, shall forfeit and pay for each and every such offence, a fine not exceeding two hundred dollars; and all the fines and forfeitures, accruing in consequence of a violation of this act, shall be recovered by indictment in any court proper to try the same; one-half to the use of the commonwealth, and the other half to the use of the complainant.

SECT. 6. *Be it further enacted*, That the qualifications of voters, in any town, on any question whether such town will send a representative to the general court, and on all questions involving the number of representatives such town will send, shall be the same, in all respects, as are required by the constitution, to entitle a person to vote in the choice of any individual or individuals to be representative or representatives in the general court of this commonwealth. [*June* 16, 1813.]

1813, Chap. 195.

An act to prevent frauds in elections.

Penalty for receiving votes of persons in the military service of the United States.

Be it enacted by the senate and house of representatives, in general court assembled, and by the authority of the same, That if any person, who is by law authorized to preside at any meeting, or to receive votes at any meeting, which may be holden for the choosing of governor, lieutenant-governor, senators and councillors, representatives to congress or to the general court, or any town officers, shall knowingly receive the vote of any person, who is in the military service of the United

States, and who is not qualified to vote agreeably to the constitution and laws of this commonwealth, in choosing as aforesaid; such person, so presiding or receiving any vote as aforesaid, shall forfeit and pay one hundred dollars, to be recovered by information to be filed and prosecuted by the attorney-general or the solicitor-general in the supreme judicial court, or by indictment in said court. [*Feb.* 28, 1814.]

1822, Chap. 104.

An act regulating elections, and declaring the qualifications of voters in town affairs.

SECT. 1. Qualification of voters.
SECT. 2. Collectors to keep a list of names of those who pay taxes. Lists to be made out. No person to vote, whose name is not on the list.
SECT. 3. Six months' residence necessary to vote in town affairs.
SECT. 4. Selectmen not answerable for omissions on lists of voters, in case, &c. Evidence to be furnished by the person wishing to have his name on the list.
SECT. 5. Moderators of meetings not liable for refusing votes of persons whose names are not on the list.
SECT. 6. Forfeitures for collectors' neglect.
SECT. 7. Repeal of sts., 1811, c. 9, 1802, c. 116, 1813, c. 68.
SECT. 8. When to take effect.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same*, That every male citizen of twenty-one years of age, and upwards, (excepting paupers and persons under guardianship,) who shall have resided within the commonwealth one year, and within the town or district in which he may claim a right to vote six calendar months, next preceding any election of any town or district, county or state officers, or any representative to congress, and who shall have paid, by himself, or his parent, master, or guardian, any state or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this commonwealth, and also every citizen who shall be by law exempted from taxation, and who shall, in all other respects, be qualified as above mentioned, shall have a right to vote in all such elections; and no other person shall be entitled to vote in such elections.

SECT. 2. *Be it further enacted*, That from and after the passing of this act, it shall be the duty of the several collectors of state or county taxes, in the several towns or districts within this commonwealth, to keep an accurate and true account of every person's name, from whom they shall have received payment of a state or county tax, and of the time of such payment, and, upon request therefor, to deliver to the person paying the same, a receipt, specifying the name of the person paying the same, and the time of such payment, which shall be received and considered as presumptive evidence thereof. And the said collectors shall hereafter, annually, fifteen days before the first Monday in March, make out and deliver to the selectmen of the town in which they reside, a true and accurate list of all persons from whom they shall, within the year then next preceding, have received any such payment, specifying the time of payment, or shall exhibit and deliver to the selectmen, the original account by them kept of such payment. And the selectmen shall, at least ten days before the first Monday in March, annually, meet together, and make out alphabetical lists of all the persons, qualified as herein before provided, to vote for any of the officers aforesaid; and they shall, at least ten days before the first Monday in March, annually, cause such lists to be posted up, at two or more public places, in their respective towns or districts: And they shall be in session, for a reasonable length of time, within forty-eight hours next preceding all town and district meetings, for the choice of any of the officers aforesaid, for the purpose of correcting the aforesaid lists of voters; and such session shall be holden, for one hour at least, on the day of such meeting, and before the opening of the same; and of the time and place of their meeting for this purpose, they shall give notice on the lists posted up as aforesaid. And it shall be the duty of the selectmen or moderator, to be provided with a complete list as aforesaid, at such election; and no person shall vote at any election, whose name shall not have been previously placed on said list, nor until the selectmen, or

moderator presiding at such meeting, shall have opportunity to find his name on the lists aforesaid.

Sect. 3. *Be it further enacted*, That every male citizen of this commonwealth, who shall have resided in any town, district, or plantation, six calendar months, next preceding any meeting for the transaction of town affairs, and who shall, in all respects, be qualified as required in the first section of this act, shall be entitled to vote at such meeting, upon all questions concerning town affairs; and no person not qualified as aforesaid shall be entitled to vote therein.

Sect. 4. *Be it further enacted*, That the selectmen of any town, in case they shall have duly entered on the list of voters, the names of all such persons as are returned to them by the collectors, as having paid any tax within two years, shall not be held answerable for any omissions on said list, or for refusing the vote of any person whose name is not on the list, unless the said person whose name may be omitted shall, before offering his vote, furnish the selectmen with sufficient evidence of his having the legal qualifications of a voter at said meeting, and request of the selectmen the insertion of his name on the list of voters.

Sect. 5. *Be it further enacted*, That the moderator of any town-meeting shall receive the votes of all such persons, whose names are borne on the list of voters, as certified by the selectmen; and he shall in no way or manner be held liable for refusing the vote of any person whose name is not on the said list.

Sect. 6. *Be it further enacted*, That any collector who shall neglect to return a list of persons, of whom he has received payment of any taxes, as required by this act, shall forfeit and pay the sum of one hundred dollars for such neglect; and any collector, who shall make a false return, as regards any part of the list returned by him to the selectmen, shall forfeit and pay the sum of twenty dollars, for each and every name, in which the said collector may have made a false return; which penalties may be recovered by an action of the case, one-half to the use of the town in which the offence is

committed, and the other half to the use of the person who sues for the same.

SECT. 7. *Be it further enacted*, That the first section of the act, passed on the eighteenth day of June, in the year of our Lord one thousand eight hundred and eleven, "regulating the choice of town officers and town-meetings," also, "An act, in addition to an act, entitled an act, in addition to the several acts, for regulating elections, and for repealing the first section of said act," passed the seventh day of March, in the year of our Lord one thousand eight hundred and three, also, so much of an act, entitled "An act more effectually to secure the rights of suffrage," passed the sixteenth of June, in the year of our our Lord one thousand eight hundred and thirteen, as requires any duty to be performed by assessors, be, and the same are hereby repealed.

SECT. 8. *Be it further enacted*, That this act shall be in force and take effect from and after the first day of June next. [*Feb.* 11, 1823.]

1831, Chap. 66.

An act in addition to "An act for regulating elections."

Law adapted to the recent change in the constitution.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, That the several provisions contained in an act passed on the twenty-fourth day of February, one thousand seven hundred and ninety-six, entitled "An act for regulating elections," which refer to meetings to be held by towns for the choice of representatives in the month of May, annually, shall have like reference to the meetings now required, by the tenth article of amendment to the constitution of this commonwealth, to be held in the month of November, annually, and each and every penalty imposed by the said act, upon any officer or other person, for any neglect of duty, or other violation of the

several provisions of the said act, shall be incurred by any officer or other person guilty of the like neglect or violation of duty, in relation to the said meetings now required to be held in the said month of November, and all the proceedings, votes, elections, returns, certificates, and records thereof. [*June* 23, 1831.]

1833, Chap. 141.

An act concerning elections.

SECT. 1. Selectmen, &c. required to make and seal up a list of the persons voted for as governor, &c., and transmit the same to the secretary of the commonwealth.
SECT. 2. Selectmen required to take an oath.
SECT. 3. Statute of 1806, c. 26, repealed.

SECT. 1. *Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same*, That it shall hereafter be the duty of the selectmen and of the clerks of the several towns and districts in this commonwealth, and of the mayor and aldermen of the city of Boston, to make and seal up a separate list of the persons voted for as governor, lieutenant-governor, counsellors and senators, and representatives in the congress of the United States, and transmit the same to the secretary of the commonwealth, or to the sheriffs of their respective counties. And when the said lists shall be received at the office of said secretary, the seals thereof shall not be broken, but the same shall be kept as they are received, until delivered by him to the two branches of the general court, or to the executive authority, according to the constitution and laws of said commonwealth.

SECT. 2. *Be it further enacted*, That the selectmen of the several towns and districts shall, hereafter, before they enter upon the execution of their official duties, take an oath or affirmation before a justice of the peace, or the clerk of the town or district of which they are selectmen, faithfully and impartially to discharge those duties respecting all elections, and

the returns thereof, and that a certificate of such oath or affirmation shall be recorded in the town or district records.

SECT. 3. *Be it further enacted*, That the statute of one thousand eight hundred and six, chapter twenty-six, be, and the same is hereby repealed. [*March* 19, 1833.]

PRECEPTS FOR NEW ELECTIONS.

[On the 5th of June, 1828, the clerk of the house of representatives, Pelham W. Warren, Esq., was directed by an order of that date, "to report to the house at its next session, all cases of precepts issued for a new election of members, and all proceedings had in the house relative to the issuing of precepts, since the adoption of the constitution of this commonwealth, so far as the same can be ascertained from the journals of the house; and any other precedents which may appear on the journals relative to the qualifications of members elected to the house; the legality of the returns of members, and other circumstances connected therewith." In obedience to this order, the clerk, at the next session, made the following report.]

List of precepts issued for new elections to the house of representatives, from 1780–1 *to* 1828–9; *and of proceedings had in the house, relative to precepts during the same period.*

1780–1. Vol. 1., of the Journals.

Precepts for new elections were issued to the towns of Falmouth, Newburyport, Rehoboth, Lincoln, Groton, Provincetown; the members from these towns having been elected by the legislature to the senate; also to Springfield, to elect a member in place of Chauncey Brewer, who was not qualified for a seat in the house, by reason of his not having been an inhabitant of the town, twelve months previous to the election.

To Amherst.—Sundry inhabitants petitioned for a precept, for the reason "that the late election was illegal." The committee on their petition reported "a resolve," which was accepted and sent up for concurrence. Subsequently a citation was issued to the selectmen to shew cause why a precept should not issue. At the second session the petition was committed, with the selectmens' answer. The committee reported an order of notice, which was not accepted; and on the ques-

tion, whether the member was duly elected, it was determined in the negative. A precept was issued and a member chosen. [See *ante*, 1.]

To Woburn.—The member was appointed sheriff, and a precept issued.

At this session a form of precept was adopted.

To Scituate.—At the second session the member resigned his seat on account of ill health, and a precept was issued.

1781–2. Vol. 2.

To Concord, Boxford, Stockbridge, Hatfield; the members of these towns having been elected by the legislature to the senate.

To South Hadley.—For what reason does not appear.

To Boston.—It does not appear for what reason, but the name of Samuel Adams appears in the list of members, both of the senate and house, and the precept may probably have been issued to fill his seat.

A form of precept was also prescribed this year.

1782–3. Vol. 3.

To Northampton, Wells, Stockbridge, Lancaster; the members having been elected to the senate by the legislature.

1783–4. Vol. 4.

To Boston, Hatfield, Leicester, Leominster, South Hadley; the members having been elected to the senate.

To Sherbourn, Gloucester, Newburyport; the members having been chosen naval officers.

To Deerfield.—John Williams, the member from this town, was excluded from his seat on account of his political character and conduct, being under bonds, and a precept was issued for a new election. At the next session, he, having been re-elected, was again excluded, for the reason, that he was ineligible on account of his former exclusion. [See *ante*, 10.]

To Pownalborough.—A representation having been made that Abiel Wood, the member returned from this town, was

an enemy to the country, and under bonds, he was ordered to appear, but having previously obtained leave of absence, does not appear, and is expelled. A committee was appointed on the expediency of issuing a precept, and on their report a precept was issued, and a form prescribed. [See *ante*, 12.]

To Swanzey.—Jerathmiel Bowers, the member from this town, being in the same situation with the member from Pownalborough, the like proceedings were had. [See *ante*, 8.]

To Brimfield.—A member appears from this town at the second session, as chosen under a precept, but I find no record of its having issued.

To Malden.—The seat of the member from this town was vacated, for the reason, that he was not chosen ten days previous to the last Wednesday in May. A motion was made, that a precept issue for a new election. Whereupon a committee was appointed to consider in what cases precepts may issue ; who reported that they might issue when a member of the house was elected to the senate, and also reported "a resolve, providing for the issuing of precepts for the choice of representatives in certain cases." This resolve was "not accepted." The town petitioned that a precept might issue, and it was issued accordingly.

To Chesterfield.—The election was controverted by one of the selectmen, for what reason does not appear, and on a question "whether there was legal evidence that the member returned was elected," it was determined in the negative, and a precept was issued, and a form prescribed.

1784–5. Vol. 5.

To Attleborough, Newburyport; members chosen to the senate.

To Brimfield; member chosen to the council.

To Machias.—This town was incorporated at the first session, and a precept issued, and the member chosen took his seat at the second session.

To Charlemont.—On a representation from the selectmen, that there had been a double choice of representative, on

account of a doubt as to the legality of the adjournment of the meeting, a committee was appointed, who made report, and on questions whether the member returned had been legally chosen, it was in each case decided in the negative, and a precept was issued, and a new member took his seat at the next session.

To South Hadley.—At the third session the member from this town resigned his seat, and a committee was appointed, "to consider the constitutionality and expediency" of issuing a precept for a new election. This committee reported, "that no precept should be issued until the town petitioned therefor in writing." This report was "not accepted;" a precept was issued, and a new member took his seat.

1785–6. Vol. 6.

To Leominster, Concord, Dracut, Northampton, Williamstown; the members having been chosen to the senate.

To Salem, on petition of B. Goodhue, and to Leicester, on petition of S. Washburn; stating that the members elected had been chosen senators by the people.

To Brunswick.—On question whether William Owen, the member returned from this town, was constitutionally chosen, the election not being ten days previous to the last Wednesday in May, it was determined in the negative. He then presented a memorial in behalf of the town, stating that they had first elected William Stanwood, who sometime afterwards declined, and the member returned had been chosen in his stead, and his seat having been vacated, he prays that a precept may issue. A precept was issued.

Paxton.—This town presented a petition, stating that their representative had been elected but nine days previous to the last Wednesday in May, and praying that a precept might issue for a new election. Leave to withdraw was granted on the petition.

Hopkinton.—The election of the member from this town was controverted, and a report was made upon the subject, of

what nature does not appear. The town petitioned for a precept, but I do not find any report on the petition.

1786–7. Vol. 7.

To Leicester, Williamstown; members being chosen to the senate.

To Newburyport, in place of two members; one having been chosen naval officer, the other a collector of impost and excise.

To Cambridge; in place of a member deceased.

To Boston; in place of a member appointed comptroller-general.

Concord.—A member was returned from this town at the the second session, in place of Mr. Hosmer, elected a senator. It does not appear that a precept had been issued, or that Mr. Hosmer was chosen to the senate by the legislature.

1787–8. Vol. 8.

The house assigned a time "for considering the right of this house to issue precepts for new elections, in case of vacancies occasioned by elections into the senate or otherwise." At the time assigned, it was "resolved, that this house have authority, by the law of the land, to, and hereby do, order their speaker *ex officio*, to issue his precepts to such towns, as (having duly chosen one or more representatives) have been deprived of their representation in whole or in part, by the seat or seats of their representative or representatives becoming vacant, empowering such towns, by a new direction, to fill up such vacancies."

To Greenfield, Sutton, Hopkinton; members elected to the senate.

To Stoughton; for what cause, does not appear.

To Boston; member elected to the council.

Groton.—This town petitioned for a precept, for the reason that the member chosen had declined. Leave to withdraw granted.

To Harpswell, Pelham, Eastham, Georgetown, Charlestown, Winthrop, Winslow.—It appears that precepts were issued to

these towns, from the circumstance of members chosen under them taking their seats at the second session. There is no record of the cause for issuing such precepts, nor of their being issued,

To Boston; at the second session, in place of a member elected to congress.

To Biddeford; at the second session, in place of a member chosen impost and excise collector.

1788–9. Vol. 9.

It was "ordered that the speaker of the house issue precepts to fill up vacancies to all such towns, as have (after they have chosen one or more representatives) been deprived of their representation, in whole or in part, by the seat or seats of their representative or representatives becoming vacant, empowering such towns by a new election to fill up such vacancies, if they see cause." I find no record of any precepts issued under this order.

To Newburyport; member chosen to the council.

To Hingham; member (Benjamin Lincoln) chosen lieutenant-governor by the legislature.

To Yarmouth; member chosen collector of impost and excise.

To Boston.—Letters were received from Charles Davis and John Coffin Jones, requesting permission to resign their seats, and praying that precepts might issue for new elections. The house granted leave to resign, and a precept was issued, under which two new members appeared at the next session.

1789–90. Vol. 10.

To Springfield; member chosen to the council.

To Williamstown; member chosen to the senate.

To Hingham; member (Benjamin Lincoln) appointed collector at Boston.

To Salem; in place of Benjamin Pickman, who had received an appointment from the United States, and resigned his seat.

To Boston.—In place of Christopher Gore, who was appointed district attorney of the United States, and resigned his seat. [See *ante*, 29.]

Freetown.—Sundry inhabitants of this town petitioned for a precept, stating that their meeting had been improperly dissolved. This petition was referred to the second session; was then committed, and a report was made, which was ordered to lie on the table. I find no final decision.

1790–1. Vol. 11.

To Westfield, Newburyport, and Springfield; members chosen to the senate.

To York.—David Sewall, judge of the district court of the United States, was returned as a member, and a question whether he was entitled to his seat being decided in the negative, a precept was issued. [See *ante*, 30.]

1791–2. Vol. 12.

To Attleborough and Yarmouth; members chosen to the senate.

To Springfield; the member elected having been chosen senator by the people.

1792–3. Vol. 13.

To Lincoln and Springfield; for the same cause as Springfield last year.

To Boston, Braintree, Gloucester, New Bedford, Fryeburg, and Hallowell; members chosen to the senate.

To Brookfield; member appointed sheriff.

To Westfield; member chosen to the council.

To Salisbury, at third session; member having died.

Needham.—Petition for a precept, (reason not stated.) The request was denied.

1793–4. Vol. 14.

To Bradford, Fryeburg, and Roxbury; members chosen to the senate.

1794–5. Vol. 15.

To Hallowell, Sherburne, New Gloucester, and Petersham; members chosen to the senate.

To Roxbury; member chosen a counsellor.

To Springfield.—A committee was appointed to consider the expediency of issuing a precept to this town, to choose a representative in place of Samuel Lyman, elected a senator by the people, who were also directed "to consider the subject at large, and report in what cases the house is authorized to issue precepts." I find no report of this committee, but that twenty-four days after, an order was passed in the usual form, for issuing a precept to Springfield to choose a member in the place of Mr. Lyman.

Dennis.—The election in this town having been declared illegal, as not having been made ten days previous to the last Wednesday in May, a motion was made that a precept issue, and was rejected.

1795–6. Vol. 16.

To Deerfield, Hallowell, Mendon, Sherburne, and Bridgewater; members chosen to the senate.

To New Gloucester; member having resigned his seat.

1796–7. Vol. 17.

To Salem; member elected a senator.

To Marblehead; member (Samuel Sewall) elected to congress.

1797–8. Vol. 18.

To Uxbridge, Norton, Great Barrington, and Groton; members elected to the senate.

To Lunenburg; member elected a counsellor.

1798–9. Vol. 19.

To Brookfield and Hallowell; members elected to the senate.

To Lunenburg; member elected a counsellor.

1799—1800. Vol. 20.

To Berkley and Groton; members elected to the senate.

1800–1. Vol. 21.

To Berwick, Charlestown, and Worthington; members elected to the senate.

To Worcester; member (Nathaniel Paine) appointed judge of probate.

1801–2. Vol. 22.

To Newburyport, Portland, and Attleborough; members chosen to the senate.

To Dracut, Coleraine, and Hatfield; in place of members "chosen senators." I do not find that that they were so chosen by the legislature.

To Wilbraham; member chosen a counsellor.

To Pepperellborough; member resigns at the third session.

1802–3. Vol. 23.

To Groton; member chosen a senator.

To Worthington.—E. Starkweather, member from this town, takes his seat as a senator, although he does not appear to have been chosen by the legislature, and on his petition a precept is issued.

From 1804–5, Vol. 25, to 1809–10, Vol. 30, inclusive, I find no record of any precept having been issued.

1810–11. Vol. 31.

To Dorchester; in place of Perez Morton, appointed attorney-general.

1811–12. Vol. 32. None.

1812–13. Vol. 33.

To Augusta; the member having accepted an office which vacated his seat.

Milton.—The election of the members from this town

having been controverted, and their seats vacated, the house refused to sustain a motion to issue a precept.

Amherst.—A new member appears from this town, at the second session, "in place of Ebenezer Mattoon, whose seat is vacated." It does not appear that any precept was issued.

Ellsworth.—A new member also appears from this town, at the third session, "in place of Moses Adams, appointed sheriff of Hancock." No precept appears to have been issued in this case.

[In the two next years, no precepts appear to have been issued.]

1815–16. Vol. 36.

To Middleborough; member elected a senator.

[In the two following years, no precepts were issued.]

1818–19. Vol. 39.

To Cambridge; member elected a counsellor.

1819–20. Vol. 40. None.

1820–21. Vol. 41.

To Quincy; member elected a counsellor.

1821–2. Vol. 42.

To Billerica; member elected a counsellor.

1822–3. Vol. 43. None.

1823–4. Vol. 44.

To Lexington, Lenox, and Worcester; members elected counsellors.

1824–5. Vol. 45. None.

1825–6. Vol. 46.

To Dorchester; member chosen to the senate.

Fitchburg.—At the second session of this year, a letter was received from John Shepley, member from this town, stating

that he had removed from the state, and submitting to the house the consideration of the question of his retaining his seat. This letter was committed to the committee on elections. Two days afterwards, on the 6th of January, this committee reported that the letter lie on the table, and they were discharged from the further consideration of the subject. The letter was, however, immediately recommitted to them, with instructions to report their opinion as to the right of the member to retain his seat, and also to report a statement of facts. On the same day, they were again discharged from the consideration of the subject, so far as regarded the instructions to report their opinion, and immediately reported the facts in the case, viz.: That said Shepley had been duly chosen, and had taken his seat at the spring session, since which time he had removed with his family into another state, and there intended to remain. On the same day, a resolution was submitted to the house, declaring that said member's seat "was vacated, he having ceased to be an inhabitant of this commonwealth," and this resolution was the next day adopted in the house. On Monday, the 9th of January, an order was submitted that a precept issue to fill the vacancy, which, on the next day, was modified by the mover into a resolution, that the speaker notify the town that the seat of their late member was made vacant by his removal out of the commonwealth, and was then indefinitely postponed. On the 24th of January, a certificate of the selectmen of the town, of the election of Joseph Downe, Jr., to fill the vacancy, was presented, and committed to the committee on elections, and on the same day Mr. Downe was qualified and took his seat. On the 3d of February, the committee on elections made a report, detailing the facts, and declaring that Mr. Downe was not entitled to his seat. The house had this report under consideration on four several days, in committee of the whole, and in the house, and on the 14th of February agreed to the report of the committee on elections, and thereby resolved, that said Downe was not entitled to his seat. A resolve was passed to pay him for his travel and attendance. [See *ante*, 243, 244.]

1826–7. Vol. 47.

To Sutton.—A resolution was submitted at the first session, requesting the speaker to issue a precept to the town of Sutton, to elect a member in place of Jonas Sibley, elected to the senate by the legislature. This resolution was committed to the committee on elections. On the same day it was ordered by the house: "That the committee on elections be directed to report, at the next session of the legislature, whether any vacancy can be filled in the house of representatives, except such as are enumerated in the second section of the sixth chapter of the constitution; that said committee report whether any member of the house of representatives can constitutionally be elected to the council board; that the said committee, in the name of this house, require of the justices of the supreme judicial court their opinions on these subjects."

At the second session the committee on elections made a report under these orders; and a letter was also received from the justices of the supreme judicial court, containing a statement of their opinion on the subjects of them.

The committee reported:—

1. That vacancies can be filled in the house of representatives, "except such as are enumerated in the second section of the sixth chapter of the constitution;" as where a member of this house is elected, by the legislature, a member of the senate, and called up to that board, the vacancy, thereby created, in the opinion of the committee, may be filled up.

2. That a member of the house of representatives can be constitutionally elected to the council board.

[The opinion of the justices, in answer to the questions propounded to them, is printed at page 245, with the cases for the year 1826–27.]

At the second session a precept was issued to Sutton for the cause assigned at the first session.

To Freetown; the member having been elected to the council at the first session.

Buckland.—At the second session an order was submitted,

directing that a precept issue to this town to elect a member to supply a vacancy arising from the death of their member. This order was referred to a committee, who reported "that a vacancy had occurred," and "*that a precept ought to be issued.*" The report was amended by striking out the words in italics, and the whole subject was then indefinitely postponed.

1827–8. Vol. 48.

To New Braintree and Easton; orders were submitted directing "that precepts issue to these towns, informing them of the election of their respective members to the senate, and authorizing them, if they see fit, to choose representatives to supply the vacancies so occasioned;" which orders were amended by striking out the latter clause, and so amended were adopted.

1828–9. Vol. 49.

To Framingham; member elected to the senate.

In reference to the latter clause of the order, the clerk reported, that he had not had opportunity to make such an examination of the journals, as to enable him fully to comply with it, but he apprehended, that as they did not generally state the reasons, nor always the exact proceedings of the house, in coming to their decisions, in cases of controverted elections, and on questions as to the qualifications of members or legality of returns, but little information could be derived from them to serve as precedents in such cases.

NOTE TO THE STATUTES CONCERNING ELECTIONS.

By the act of 1835, c. 135, it was enacted, that every person, elected to the office of selectman, who should enter upon the duties of his office, before taking the oath required by the act of 1833, c. 141, § 2 (*ante*, p. 713), should forfeit and pay a sum not exceeding eighty nor less than forty dollars.

PREFACE TO INDEX.

THE following Index, besides abstracts of the cases and opinions reported in this volume, contains, also, arranged under appropriate heads, and with references to the volumes in which they occur, "a digest of all the decisions of the supreme judicial court, concerning the qualifications of voters, and the duties of town officers in presiding at elections," which the commissioners were directed "to include in, or append to," the present work. To the cases thus inserted, the commissioners have added one case, decided in the same court, relating to the privilege of freedom of speech and debate in the legislature, and three cases concerning the duties of mayor and aldermen, and the offence of illegal voting, from Thatcher's Criminal Cases. The abstracts of cases taken from other volumes will be found under the heads of *Action; Alien; Ballot; Burden of Proof; Disorderly Behavior in Town-Meeting; Domicil; Electors*, I., II.; *Evidence; Mayor and Aldermen; Meeting*, III.; *Pecuniary Qualification; Privilege; Selectmen; Students at Colleges; Town Clerk, Variance; Voters, List of; Voting, Illegal; Votes, Reception of, &c.*

INDEX.

ACTION.

1. An action lies against selectmen for refusing to receive the vote of a qualified elector, although not chargeable with malice.[1] *Lincoln* v. *Hapgood*, 11 Mass. 350.
2. In an action against the selectmen of a town for refusing to receive the plaintiff's vote, it appeared that at the election in question, a selectman, stationed in front of a table, upon which a box was placed for the reception of the votes, took the votes, as they were presented, in his hand, and when the names of the voters were found on the check list, deposited the votes in the box; that when the plaintiff came to vote, the selectman offered to take the vote in his hand, as he had previously done in every instance, but the plaintiff demanded the box, which was on the table, in order that he might deposit his vote therein himself; that the selectman declined complying with such demand, but reached towards him another box, which had been used on former occasions for the reception of votes; and that the plaintiff refused to deposit his vote therein. It was held, that the box so presented to the plaintiff was the ballot-box, within the meaning of the Rev. Sts., c. 4, § 4, which provide, that no vote shall be received "unless deposited in the ballot-box by the voter in person;" and, consequently, that in the absence of any malicious design to deprive the plaintiff of his rights, this was not an unlawful refusal to receive his vote. *Gates* v. *Neal*, 23 Pick. 308.
3. A voter, who is challenged at the poll, cannot maintain an action against selectmen for refusing to receive his vote, if they do not act wilfully or maliciously, but under a mistake into which they are led by his conduct, which was likely to mislead them into a belief, that he had abandoned his claim to a right to vote. *Humphrey* v. *Kingman*, 5 Met. 162.
4. An action cannot be maintained against assessors, by an individual, who is liable to taxation, for their omission to tax him, whereby he loses his right to vote at an election, unless it be shown affirmatively that they omitted to tax him wilfully, purposely, or with design to deprive him of his vote; or unless they had actual knowledge of his liability to taxation, so plain and obvious, that a sinister purpose, and wilful omission to tax him, in pursuance of such purpose, may be reasonably inferred by a jury. *Griffin* v. *Rising*, 11 Met. 339.
5. If selectmen, being in session for the purpose of revising the list of voters, previous to a town-meeting, upon the application of one whom they know to be a legal voter, refuse to place his name on the list, and inform him that they shall not do so, in consequence of which he omits to offer his vote, at the meeting, the selectmen will be liable in an action on the case for such refusal, notwithstanding the voter does not offer his vote. But if, after such refusal, the selectmen reconsider their determination, and place the voter's name on the list, before the opening of the meeting, so that his vote, if offered, would be received at the first voting or balloting, the selectmen will not be so liable. *Bacon* v. *Benchley*, 2 Cush. 100.

See SELECTMEN, 3.

[1] The liability of a returning officer, for refusing the vote of a qualified elector, was first established in England, at the beginning of the last century, in the case of *Ashby* v. *White*, (2 Ld. Raymond, 988); in which, and in succeeding cases, it was held, contrary to the principle established in the case of *Lincoln* v. *Hapgood*, that the malice of the defendant was an essential ground of the action. The doctrine of the latter case has been followed in Maine, (*Osgood* v. *Bradley*, 7 Greenleaf's Reports, 411); but in New Hampshire (*Wheeler* v. *Patterson*, 1 N. H. 88), New York (*Jenkins* v. *Waldron*, 11 John. Rep. 114), and Pennsylvania (*Westerley* v. *Geyer*, 11 S. & R. 35), the doctrine of the English cases has been established. The decision, in the case of *Lincoln* v. *Hapgood*, seems at variance with established principles, and not to have been followed in analogous cases, even in this commonwealth. See *Gates* v. *Neal*, 23 Pick. 308; *Humphrey* v. *Kingman*, 5 Met. 162; *Griffin* v. *Rising*, 11 Met. 339.

AGE.

The age of a voter may be proved by the record of his birth, inserted in the town records, coupled with evidence of his identity. *Case of James M. Freeman*, 543.

AIDER AND ABETTOR.

See VOTING, ILLEGAL, 3, 4, 5.

ALIEN.

1. A, a citizen of the colony of Connecticut, in the year 1759, removed to the province of Nova Scotia, carrying with him B., his infant son. In 1797, B. removed from Nova Scotia to Manchester, in this state, where he purchased real estate, which he occupied for more than ten years, paying all the taxes assessed upon it. It was holden, that he was an alien, and therefore acquired no settlement in Manchester. *Manchester* v. *Boston*, 16 Mass. 230.
2. Persons born in Massachusetts before the declaration of independence are not aliens. *Ainslie* v. *Martin*, 9 Mass. 454; *Martin* v. *Woods*, 9 Mass. 377.
3. A person, who left this country after the commencement of the revolutionary war, went to and resided in the British territories for several years, and returned to the United States before the treaty of peace, is a citizen and not an alien. The Absentee Act of April 30, 1779, operates no disqualification upon a person who was not prosecuted and convicted under it. *Kilham* v. *Ward*, 2 Mass. 236; *Gardner* v. *Ward*, 2 Mass. 244, *Note*.
4. A native of Massachusetts, leaving this country after the commencement of hostilities with Great Britain, in 1775, continuing with the British until the treaty of peace, and thenceforward to his death, became an alien. *Palmer* v. *Downer*, 2 Mass. 179, *Note*.
5. A person born in Great Britain came to this country as a soldier in the British army, under General Burgoyne, was made a prisoner of war on the 17th of October, 1777, and was never exchanged, but not being confined, he voluntarily continued his residence in this commonwealth until the present time, 1824. It was held, that he was a citizen. *Cummington* v. *Springfield*, 2 Pick. 394.
6. So, of one born in England, who deserted from the same army, and had ever since resided in this commonwealth. *Ib.*
7. Under the statute of the United States, passed April 14, 1802, providing that the children of persons, who were then or had been citizens of the United States, should, though born out of the limits of the United States, be considered citizens, it was held, that the child of a father who was a citizen of the United States after the treaty of peace with Great Britain, by which the independence of the United States was acknowledged, and after the adoption of the constitution of the United States, was not an alien, although born without the limits of the United States. *Charles* v. *Monson and Brimfield Manuf. Co.*, 17 Pick. 70; *Methuen*, 428.

See RATABLE POLLS, 5, 6, 7, 8, 9.

AMENDMENT OF RECORD.

See RECORD, 4; TOWN CLERK, 3, 4.

AMENDMENT OF RETURN.

See MAYOR AND ALDERMEN, 3, 6.

APPORTIONMENT.

See RIGHT OF REPRESENTATION, 7, 8, 9, 10.

ASSESSORS.

See ACTION, 4; ELECTORS, II, 2.

ASSESSORS, CERTIFICATE OF.

See EVIDENCE, 3, 4, 5, 6.

BALLOT.

1. A piece of paper, given in as a ballot, having the name of a candidate written upon it twice, cannot be severed and counted as two votes. *Cambridge*, 3.
2. A piece of paper, having the same name written upon it twice, constituting two ballots not separated, is, it seems, to be considered and counted as one ballot. *Hopkinton*, 26; *Ashfield*, 583.
3. In order to constitute an election, the candidate voted for must receive the votes of a majority of the electors; and where an election is made by a general ticket, each ballot is to be counted as one vote, in determining the whole number of votes, although it do not bear upon it as many names as there are members to be chosen. *Charlestown*, 167; *Case of William B. Adams*, 267; *Barre*, 365.
4. An election for the choice of representative being held at the same time with an election for register of deeds, votes, bearing the names of persons not resident in the town, and with the words "for register of deeds" thereon, if deposited in the box appropriated for the reception of votes for representative, are not, it seems, to be counted in making up the whole number of votes given in for representative. *Case of Thomas Nash, Jr.*, 439.
5. Where a meeting was held, for the election, at the same time, of governor, lieutenant-governor, and senators; representative in congress; and representative in the general court; and three separate boxes, properly labelled, were provided for the reception of the votes; it was held, that a ballot marked for "representative to congress," and describing the candidate as an inhabitant of another town, found in the box appropriated to the votes for representa-

tive in the general court, could not be counted to make up the whole number of votes given for the latter. *West Newbury*, 594.

6. Printed votes are written votes, within the meaning of the provision in the constitution, that "every member of the house of representatives shall be chosen by written votes." *Henshaw* v. *Foster*, 9 Pick. 312.

See ENVELOPE, 6, 7, 8, 9; MEETING, VIII., 4, 10.

BALLOT-BOX.

It is the duty of every town to provide itself with proper ballot-boxes. *Somerset*, 576.

See ACTION, 2; MEETING, V., 17; VIII., 8, 9, 15.

BALLOTING.

1. Where a greater number of members, than a town is entitled to send, is elected by a general ticket, at one balloting, the election of all is void; but where the members are chosen at separate ballotings, the elections of those only, who are elected after the constitutional number has been chosen, are void. *Danvers*, 49; *Westminster*, 63; *West Springfield*, 64; *Bath*, 73; *Dighton*, 74; *Oxford*, 75; *Sutton*, 80; *Boston*, 90; *Belchertown*, 103; *Milton*, 146; *Sutton*, 154; *Malden*, 293.

2. A warrant was duly issued and served for a meeting for the choice of three representatives. Afterwards a second warrant was issued for a meeting, on the same day, for the choice of a fourth, of which less notice was given than was usual in the town. Four representatives were chosen at successive ballotings. It was held, that there was no legal notice of the second warrant, and that the election of the person last chosen was void. *York*, 139.

3. A town, entitled to send *three* representatives, voted to send *four*, and proceeded to elect four at separate ballotings: The election of the last chosen was adjudged void, and a question raised as to the validity of the election of the first three chosen. *Sutton*, 154.

4. Where there were several ballotings at one election, which was controverted, and the last balloting was proved to have been ineffectual, the member was allowed to show, that he was in fact elected at one of the other ballotings. *Northbridge*, 373.

See MEETING, VI., 9; VII., 8, 13.

BOUNDARY LINES OF COUNTIES.

The legislature have constitutional power to change the boundary lines of counties, for all purposes for which counties are established, except that of constituting senatorial districts. *Opinion of the Justices*, 634.

BRIBERY AND CORRUPTION.

Where several individuals, with a view to induce a town to elect six representatives, being the whole number to which it was entitled, of a particular party, gave a bond, for the use of the inhabitants, conditioned that the whole expense of such a representation should not exceed the pay of two members; an election, made under such circumstances, was held void, although the members elected had no agency in procuring such bond to be given. *Gloucester*, 97. See also *Sutton*, 80.

See TREATING.

BURDEN OF PROOF.

On the trial of a party indicted for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, when the only question is, whether he had resided in the town where he voted six months next preceding the election, evidence that he had resided in another town, until within seven months of the election, does not put upon him the burden of showing that he had changed his residence, but the burden of proof remains on the commonwealth. *Commonwealth* v. *Bradford*, 9 Met. 268.

See DOMICIL, 15; MEMBER, III., 2.

BY-LAW.

See MEETING, III., 4, 6; VI., 5; MEMBER ELECT, 2.

CENSUS, DECENNIAL.

See RIGHT OF REPRESENTATION, 8, 9, 11.

CERTIFICATE.

1. Where a town and district, or two towns, are united, by an act of the legislature, for the purpose of electing representatives, the certificate of a member must be signed by a majority of the selectmen of both, or it will be void:—If, in such case, it be proved, that the selectmen of one improperly refused to sign the certificate, the house has power, by the general provision of the stat. 1795, c. 55, § 1, (Rev. Sts. c. 5, § 8,) to give validity to any certificate, which shall be "to their acceptance." *Lanesborough and New Ashford*, 125.

2. Where the return of a representative, elected by the votes of a town and a district annexed to it for the purpose of electing representatives, was signed by the selectmen of the town only, the house directed the member to procure a certificate of the selectmen of the district. *Lanesborough and New Ashford*, 183.

3. Three members being returned, and the selectmen having certified in the return, that two of them were duly elected, and, in relation to the third, a statement of

facts, upon which they referred to the house the question whether such member was duly elected, the house thereupon instituted an inquiry into the validity of the election. *Attleborough*, 254.

4. Where two selectmen only, out of three, were present at an election, it was held, that a certificate, signed by one of them (the other being the member chosen) and the absent selectman, was "to the acceptance of the house." *Berkley*, 257.
5. The certificate of the selectmen of a town, in the form prescribed by law, of the election of a member therein, on some one of the days within which an election may take place agreeably to the constitution, is sufficient to entitle the member so returned to his seat; and cannot be invalidated by any certificates of other town officers, or by copies of the town records. *Report on Certificates*, 347.
6. A certificate or return is insufficient, which does not specify the year in which the election was made, or the certificate given. *Ib.*
7. The date of the certificate is not material, provided the election therein recited appears to have been held on the proper day. *Ib.*
8. The omission of a return on the certificate, that notice was given of the election, and the person elected summoned to attend, is not sufficient to prevent the member from taking and holding his seat. *Ib.*; *Report, &c.*, 541.
9. If there are but three selectmen in a town, and one of them becomes incompetent to act, and a second is elected representative, the third may certify the election, and the member himself may sign the certificate, even after he has taken his seat, and his return has been controverted for want of a proper certificate. *Belchertown*, 421.

See ELECTION, 7; MAYOR AND ALDERMEN; RECORD, 4; RETURN, 4, 5.

CHAPLAIN IN THE ARMY OF THE UNITED STATES.

See MEMBERS, IV., 10.

CHECK LIST.

See MEETING, VI., 5, 11; MEETING, VII., 7, 10, 11, 12, 13, 18, 19.

CITIZEN.

See ALIEN; MEMBER, II., 3.

COLLECTOR.

The validity of an election is not affected, by a neglect of the collector, to make a return to the selectmen, of the names of persons paying taxes, agreeably to the requisition of the statutes of 1822, c. 104, § 2. and 1833, c. 102, § 1, (Rev. Sts. c. 3, §§ 3, 4.) *Hollis*ton, 297.

COMMISSIONER.

See PRACTICE, 6.

COMMISSIONER OF BANKRUPTS.

See MEMBER, IV., 8.

COMMITTEE.

See PRACTICE, 10.

COMMONWEALTH v. MAYOR AND ALDERMEN OF LOWELL, 674.

CONSTABLE, CERTIFICATE OF.

See EVIDENCE, 2.

CONTEMPT.

See MEMBER, I., 6.

CORPORATE RIGHT.

See MEETING, VII., 3, 4, 5, 6; RIGHT OF REPRESENTATION, 3, 4, 6.

COUNCIL.

Members of the house of representatives may constitutionally be elected to the council. *Opinion of the Justices*, 245.

CRIME, DISQUALIFICATION BY REASON OF.

See *Falmouth*, 205, *Note*.

CUTTING AND SEVERING OF VOTES.

See MEETING, VIII, 2, 4.

DEATH OF MEMBER.

See MEMBER ELECT, 2.

DEBATE.

See MEETING, VII., 1, 2, 3, 4, 5, 6; PRIVILEGE.

DECLINING OF MEMBER.

See MEMBER ELECT, 1; *Case of Christopher Gore*, *Note*, 29.

DEPOSITIONS.

See EVIDENCE, 10; PRACTICE, 6.

DEPUTY COLLECTOR OF THE CUSTOMS.

See MEMBER, IV., 12, 13.

DEPUTY MARSHAL OF THE UNITED STATES.

See MEMBER, IV., 5.

DEPUTY POSTMASTER.

See MEMBER, IV., 9.

DISORDERLY BEHAVIOR IN TOWN-MEETING.

1. An indictment lies at the common law for disorderly behavior in town-meeting. *Commonwealth* v. *Hoxey*, 16 Mass. 385.
2. The penalty imposed by the statute of 1785, c. 75, § 6, (Rev. Sts. c. 15, § 130,) for disorderly behavior in town-meet-

ing does not attach, unless the offender persists in such behavior after notice from the moderator, and does not withdraw from the meeting after being directed so to do by the moderator. *Ib.*

DISTRICT.

See TOWN AND DISTRICT.

DISTRICT ATTORNEY OF THE UNITED STATES.

See MEMBER, IV., 3.

DOMICIL.

1. A citizen of Vermont, having resided in a town in this state ten years, and having paid taxes more than five years, acquired a settlement in such town, although he left his wife and children upon his farm in Vermont, and occasionally visited them there, and once tarried with them five or six months during the term. *Cambridge* v. *Charlestown*, 13 Mass. 501.
2. Where a citizen, having lived many years at W. in the county of M., purchased and furnished a house at B., in the county of S., and afterwards with his family, spent his summers at his house in W., where he continued to pay his taxes, and his winters at his house in B., and died while so residing in B.; it was held, that he was an inhabitant of W., within the meaning of st. 1817, c. 190, and that the probate of his will might be taken in the county of M. *Harvard College* v. *Gore*, 5 Pick. 370.
3. A domicil, being once fixed, will continue, notwithstanding the absence of the party, until a new domicil is acquired. *Jennison* v. *Hapgood*, 10 Pick. 77.
4. The intention to abandon a domicil, and actual residence at another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time, will not produce a change of domicil. *Ib.*
5. If a person domiciled here removes to another state, for the purpose of avoiding the effects of pecuniary embarrassments, and to entitle himself to sue in the courts of the United States, but intending to return to his family after having accomplished his object, he cannot be considered as having removed his domicil. *Ib.*
6. The domicil of a wife follows that of her husband. *Greene* v. *Greene*, 11 Pick. 410.
7. For some purposes a man may have two domicils. *Ib.*
8. A person is legally taxable, for personal property, in the town of which he is an inhabitant when the tax is assessed; but his election, to pay such tax in one town rather than in another, is only one circumstance bearing upon the question of his actual habitancy, and must be taken in connection with the other circumstances of the case, in order to determine where he is legally liable. *Lyman* v. *Fiske*, 17 Pick. 231.
9. Every person must have a domicil somewhere. A person can only have one domicil, for one purpose, at one and the same time. *Abington* v. *North Bridgewater*, 23 Pick. 170.
10. Where the boundary line between the towns of R. and N. B passed through a dwelling-house in such a direction, that that portion of the house which was in N. B. was sufficient in itself to constitute a habitation, while the portion in R. was not sufficient for that purpose, it was held, that a person, by occupying such house, acquired a domicil in N. B. *Ib.*
11. It seems, that if, in such case, the line had divided the house more equally, the fact that the occupant had habitually slept in that part, which was in N. B., would be a preponderating circumstance to show that he was domiciled in that town, and in the absence of other evidence, would be decisive of the question. *Ib.*
12. In an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, a letter from him to his agent in that place, expressing his intention to reside abroad permanently, is admissible in evidence, if written before he knew that a tax had been assessed upon him, though written after the assessment; otherwise, it seems, of such a letter written after he knew that he was taxed. *Thorndike* v. *Boston*, 1 Met. 242.
13. A citizen of Boston, who had been at school in the city of Edinburg when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there, if he ever should have the means of so doing, removed with his family to that city, in 1836, declaring, at the time of his departure, that he intended to reside abroad, and that if he should return to the United States, he should not live in Boston. He resided in Edinburg and vicinity, as a housekeeper, taking a lease of an estate for a term of years, and endeavored to engage an American to enter his family for two years, as instructor of his children. Before he left Boston, he made a contract for the sale of his mansion house and furniture there, but shortly after procured the contract to be annulled, (assigning as his reason therefor, that in case of his death in Europe, his wife might wish to return to Boston,) and let his house and furniture to a tenant. It was held, that he had changed his domicil, and was not liable to taxation as an inhabitant of Boston, in 1837. *Thorndike* v. *Boston*, 1 Met. 242.
14. A native inhabitant of Boston, intending to reside in France with his family, departed for that country in June, 1836,

and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year, in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family in about nine months afterwards. It was held, that he continued to be an inhabitant of Boston, and that he was rightly taxed there during his absence, for his person and personal property. *Sears* v. *Boston*, 1 Met. 250.

15. B., an inhabitant of the town of G., conveyed his farm on the 1st of April, and afterwards resided a short time in the house of S., in said town, and on the 27th of April went with his family to the town of T., and remained there in the house of his brother, until several days after the 1st of May. He and his family were afterwards in G. most of the time, until the 27th of May, when they removed to Illinois. In a suit to recover a tax assessed on B. by the assessors of G., it was held, that, for the purpose of showing that he had changed his domicil before the 1st of May, he might give in evidence his declaration, made to S. about three weeks before he went to T., that he should leave G. before the 1st of May, and remove, with his family, to T. to reside at his brother's, and make his house a home until he should go to Illinois. It was held also, that the burden of proof was on B., to prove that he had changed his domicil before the 1st of May. *Kilburn* v. *Bennett*, 3 Met. 199.

16. Whether a person, removing from one town to another, intends to change his residence, is a question of fact, and not of law. *Fitchburg* v. *Winchendon*, 4 Cush. 190.

17. A removal from Boston with one's family, just before the 1st of May, raises a strong presumption of a change of inhabitancy, but that presumption may be rebutted by evidence of the intention of the party so removing. *Case of Ralph W. Holman*, 647.

See Burden of Proof; Member, II., 4, 5, 6, 7, 8; Students, &c.

DOUBLE RETURN.

See *Hopkinton*, 26, and *Note*; *Harwich*, 38; *Troy*, 56.

DWELLING-HOUSE.

See Domicil, 10, 11.

ELECTION.

1. An election, effected by illegal votes, is not confirmed by a subsequent refusal of the meeting to reconsider the choice. *Chesterfield*, 7.

2. Where a meeting, which was held for the choice of a representative, and at which an election was effected, was adjourned to another day; and at the adjournment, it was voted to reconsider the votes passed at the previous meeting "respecting the choice of a representative;" it was held, that the election was not thereby invalidated, although the first meeting was very thinly attended, and at the adjournment a much larger number of the inhabitants was present. *Paxton*, 20.

3. When an election has been legally made, it cannot be superseded or invalidated by another election made at a subsequent meeting. *Hopkinton*, 26.

4. A town having a right to send two representatives, at a meeting called to elect a person to represent the inhabitants in the general court, elected a member, and then voted to choose another, and thereupon elected a second; the election of the latter was held good, *Harvard*, 59.

5. The election of a member, at one meeting, cannot be superseded, by an election of another, at a second meeting. *Dresden*, 151.

6. An election, made after a vote not to send, does not become valid, by a reconsideration of that vote after such election. *Winslow*, 201.

7. The return of a member having stated that he was chosen "by the minor part of the electors present at the meeting," and it appearing that the election took place after a vote not to send, which had not been reconsidered, the election was held void. *Case of Moses S. Fearing*, 231.

8. An election, which takes place after a vote that the meeting be dissolved, and a declaration thereof made to the meeting by the presiding officer, is void. *Chelsea*, 474.

9. The fact, that a person who claims to have been elected a representative at a meeting, at the close of which the presiding officer declared that no choice had been effected, was a candidate for the same office at a subsequent meeting, cannot impair any right acquired by him at the former meeting. *Case of James M. Freeman*, 543.

See Envelope, 3, 4, 5; Meeting, VI., 8, 9; Practice, 1, 9, 11, 13; Votes, Whole Number, &c.

ELECTORS, QUALIFICATIONS OF.

I. *As to Residence.*
II. *As to Payment of a Tax.*

I. Residence.

1. Of the qualification of electors as to residence. *Weston*, 67; *Weston*, 78; *Concord*, 85; *Spencer*, 178; *Methuen*, 428.

2. Persons residing on lands purchased by, or ceded to, the United States, for navy yards, arsenals, &c., in this commonwealth, the state only reserving concurrent jurisdiction, as to the service of process therein, are not liable to taxa-

tion, and do not by such residence acquire any elective franchise, legal settlement, or right to the benefit of common schools, as inhabitants of the towns in which such territory is situated. *Opinion of the Justices*, 416.

3. The intention of a voter, testified to by himself, as to his residence, is to be taken as conclusive, unless impeached. *Dartmouth*, 465.
4. P. removed from Dudley to Webster, in October, 1842, and was employed in Webster up to the time of the election in 1843, intending during all that time to remove his family to W., as soon as he could find suitable accommodations for them. He did not in fact remove them before August, 1843. It was held, that he was not a legal voter in Webster at that election. *Webster*, 526.
5. A person having his permanent house in one town, and being legally qualified to vote in such town at the election of public officers, is not disqualified by a temporary absence in another town, and being there admitted to vote. *Lincoln* v. *Hapgood*, 11 Mass. 350.
6. An elector of representative in congress must have had his home one full year previous to the election in the town in which he would vote. *Williams* v. *Whiting*, 11 Mass. 424.

II. Payment of a Tax.

1. Where a person, who was in possession of real estate of the yearly value of from twelve to fifteen dollars, to which he had no legal title, had received assistance from the town, for the support of a minor child who was an idiot, and had also, for that reason and on account of his poverty, been exempted from taxation for several years, it was held, that he was not qualified to vote in the election of representatives. *Berkley*, 257.
2. Assessors have no authority, under the tax acts, arbitrarily to exclude aged and poor persons from the right of voting, by an omission or abatement of their taxes. Such omission or abatement must be with the consent, expressed or implied, of the person who is omitted to be taxed, or whose tax is abated. *Opinion of the Justices*, 285.
3. Persons whose taxes, "by reason of age, infirmity, or poverty," are abated, or who, for those reasons, are omitted to be taxed, by the assessors, are not "citizens exempted by law from taxation," within the intention of the 3d article of the amendments to the constitution; and, therefore, are not entitled to vote without paying taxes. *Ib.*
4. If such persons have, in fact, paid no tax, assessed within two years next preceding any election, they are not entitled to vote therein, though such nonpayment is occasioned by an exemption or abatement, under the discretionary authority of the assessors. *Ib.*
5. But if they have paid any tax, assessed within two years previous, they are entitled to vote in any election for governor, lieutenant-governor, senators, and representatives. *Ib.*
6. Where the right of an elector, to vote at an election of representative on the 9th of November, 1835, was called in question, on the ground that he had not paid the requisite tax; and it appeared, that such elector had not paid any county tax assessed in the year 1834 or in 1835, previously to the day of the election; but it did not appear, that no county tax was assessed between the 9th of November, 1833, and the assessment of taxes for 1834; it was held, that the evidence produced did not cover the whole term of two years next preceding the day of the election, and did not invalidate it. *New Marlborough*, 323.
7. The assessors of a town have no legal authority, after the assessment of a general tax has been made, and committed for collection, to assess a poll or other tax on any person otherwise qualified, for the purpose of enabling him to vote at any election; nor will the payment by any person, of the tax so assessed, qualify him to vote, under the provisions of the constitution. *Opinion of the Justices*, 343.
8. In towns where no state or county tax is assessed, the inhabitants are nevertheless entitled to vote in the election of state officers. *Report of the Committee on the Judiciary*, 414.
9. A person over seventy years of age, who is the owner of taxable property, which the assessors, in their discretion, exempt from taxation, on account of the age and poverty of the owner, is not entitled to vote, within the exception contained in the third article of the amendments to the constitution; otherwise of a person more than seventy years of age, who not being possessed of taxable property, would be assessed a portion, but for the exemption therefrom by reason of age. *Report of the Committee on the Judiciary*, 413; *Sharon*, 502.
10. Persons, who have been exempted from taxation on account of their poverty, under the provisions of the eighth clause of the 5th section of the Rev. Sts., c. 7, and st. 1843, c. 87, § 1, for two successive years before their arrival at the age of seventy, are not entitled to vote in the election of governor, lieutenant-governor, senators, and representatives, under the third article of the amendments to the constitution, as persons exempted by law from taxation. *Opinion of the Justices*, 535.
11. Payment of a state or county tax, within two years next preceding the election of governor, &c., by one who is in other respects a qualified voter, entitles him to vote at such election, although such tax was illegally assessed upon him. *Humphrey* v. *Kingman*, 5 Met. 162.
12. Though a tax, which is assessed upon one person, is paid for him by another,

without his previous authority, yet if he recognizes the act, and repays or promises to repay the amount, on the ground, that such person acted as his agent, he thereby acquires the same right to vote as if he had paid the tax with his own hand. *Ib.*

See *Methuen*, 428; *Ashfield*, 582; PAUPER; PECUNIARY QUALIFICATION; PRACTICE.

ENVELOPE.

1. It seems, that, under the statute of 1851, c. 226, if an unsealed envelope is found in the ballot-box, the presumption is to be, till the contrary appears, that it was properly sealed, when deposited; but if an envelope is unsealed when deposited, the vote in it is to be rejected. *North Chelsea*, 644.
2. A vote for representative, since the statute of 1851, c. 226, cannot legally be counted, unless it is enclosed in an envelope. *Ib.*
3. If some of the votes given in at an election for representative are not taken from the envelopes and counted, the election will not be thereby affected, provided it is admitted or proved, that the member elected received a majority of all the votes. *Chester*, 664.
4. Where the selectmen, after counting the ballots given in at an election for representative, and declaring that an election had been effected, subsequently found among the used and broken envelopes two additional ballots for representatives, and thereupon counselled together, added the votes so found to the count, and declared that no election had taken place; it was held by the house, that such ballots ought not to have been counted. *Sunderland*, 657.
5. Where an election was controverted, on the ground, that the votes in unsealed envelopes were rejected, which, if they had been received, would have prevented an election: and the committee on elections reported thereon, that the number so received was not certainly proved; that they were not examined until more than an hour afterwards, during which time, they were out of the custody of the selectmen; that only three were certainly proved to have been received, one of which was unsealed when deposited, and two unsealed envelopes which were examined contained votes for the sitting member; it was held by the house, that such election was valid. *Hopkinton*, 654.
6. Whether ballots found in envelopes that have been used, opened, and thrown away, and carried from the meeting, can be counted—*Quære*. *Bolton*, 655.
7. Whether a separate ballot, found in an envelope, containing a ballot for governor, lieutenant-governor, and senators, but, without any designation of the office for which it was intended, can be counted as a vote for representative—*Quære*. *Ib.*
8. Whether the ballots contained in unsealed envelopes are to be counted as votes—*Quære*. *Ib.*
9. Where three representatives were to be elected, and the votes for governor, lieutenant-governor, senators and representatives, properly designated, were deposited in the ballot-box, in envelopes, agreeably to the provisions of the statute of 1851, c. 226, § 1; and in one envelope, a vote for governor, lieutenant-governor, senators, and *two* representatives, was upon one piece of paper, and a vote for *one* representative upon another; and, in another envelope, a vote for *three* representatives was on a separate piece of paper; it was held, that each of these envelopes was properly counted as a ballot, containing votes for governor, lieutenant-governor, and senators, and for three representatives. *Danvers*, 648.

EVIDENCE.

1. The statements of a member, made in his place by direction of the house, received as evidence. *Vassalborough*, 5.
2. The certificate of a constable, of the warning of a meeting for the choice of a representative, was held to be conclusive evidence of such warning. *Woburn*, 7.
3. The qualification of a member, as to property, being called in question, was allowed to be proved by the certificates of the selectmen and assessors of the town. *Shelburne*, 62.
4. The validity of an election being questioned, on the ground, that the town did not contain a sufficient number of ratable polls to entitle it to two members, a certificate of the assessors, corroborated by the selectmen, as to the number of ratable polls therein on the first of May preceding the election, was admitted as evidence of the requisite number. *Westminster*, 63.
5. Where an election was questioned, on the ground of a deficiency of ratable polls, it was held, that the certificates of the assessors, or the tax bills of the year next preceding the election, were admissible as *prima facie* evidence of the number. *Resolution of the House*, 64.
6. Assessor's certificate is presumptive evidence of the requisite number of ratable polls. *Medford*, 76; *Raymond*, 82.
7. An election being controverted on the ground of an insufficiency of ratable polls, and the selectmen having neglected to furnish the petitioners with a list of the polls, agreeably to an order of the committee on elections, the election was invalidated, on presumptive evidence of the insufficiency. *Dighton*, 74.
8. Where an election was controverted on the ground of a deficiency of ratable polls, and the member neglected to furnish the petitioners with a list of those persons whom he considered as ratable polls, agreeable to the requisition of the

committee on elections; the election was adjudged void, on *prima facie* evidence of the insufficiency. *Belchertown*, 103.
9. The declaration of a voter, whose right to vote was in question, made after the election, and when he was not under oath, that he voted for a particular individual, was held not to be sufficient evidence for whom he voted, on an inquiry into the validity of the election. *Dresden*, 201.
10. Depositions are not admissible in evidence, to invalidate an election, unless the member whose right is in question has been notified of the intention to take them, or was present at the taking thereof. *New Marlborough*, 323.
11. The certificate of a town clerk is not evidence of the time during which the poll at an election was kept open. *Russell*, 522.
12. It seems, that a certificate of the selectmen and clerk of a town, stating what occurred at a meeting at which they officiated, is not evidence. *Williamstown*, 526.
13. Where, in the trial of an indictment for illegal voting at a ward-meeting in the city of Boston, a copy of the record of the proceedings of that meeting, kept by the clerk of the ward, was read, to show that such proceedings were illegal, and oral testimony was offered to prove the same; it was held, that such testimony was inadmissible, because the record was the best evidence of the fact. *Commonwealth* v. *Wallace*, Thach. Cr. C. 592.
14. An allegation, in an indictment for illegal voting, &c., that a meeting of the inhabitants of the town of A. was duly holden, is proved by evidence that a meeting of the inhabitants of A. who were qualified to vote, was duly holden. *Commonwealth* v. *Shaw*, 7 Met. 52.
15. When the warrant for a town-meeting, and the return thereon, are inserted in the town records, with the proceedings of the town at the meeting, those records are evidence of the holding of the meeting, and the original warrant need not be produced. *Ib.*

See AGE; DOMICIL, 8, 11, 12, 15; ELECTORS, I, 3; INELIGIBLE CANDIDATES, 1; MAYOR AND ALDERMEN, 4, 5, 6; OATH; PRACTICE, 3, 6, 14, 16, 17, 20; RECORD, 1, 2, 3, 4; RIGHT OF REPRESENTATION, 11; SELECTMEN, 6; VOTING, ILLEGAL, 4, 8, 9.

EXCLUSION FROM THE HOUSE.

See MEMBERS, I., 5, 8, 13.

EXPENSES.

The expenses of the "Ashfield Election Case" paid out of the public treasury, 587.

EXPULSION.

See MEMBERS, I., 4, 10.

FACT, QUESTION OF.

See DOMICIL, 16; SELECTMEN, 5.

FALSE ANSWER.

See VARIANCE; VOTING, ILLEGAL, 7.

FORGERY.

See MEMBER, I., 13, 14.

FOURTH MONDAY OF NOVEMBER.

See MEETING, I.; III., 4; IV., 3; VII., 17.

FREEDOM OF SPEECH AND DEBATE.

See PRIVILEGE, 2, 3, 4, 5.

GENERAL TICKET.

See BALLOT, 3; BALLOTING, 1.

ILLEGAL VOTES.

See ELECTION, 1; VOTES, RECEPTION OF, &c., 1, 2, 3, 4, 5, 6.

IMPEACHMENT.

See MEMBER, I., 12.

INDICTMENT.

See DISORDERLY BEHAVIOR, &c., 1; EVIDENCE, 13, 14; MAYOR AND ALDERMEN, 1, 4; MEMBERS, I.; SELECTMEN, 6; VARIANCE; VOTING, ILLEGAL, 4, 7, 8. See also *Supplement*, 674.

INELIGIBLE CANDIDATES.

1. Where there are two persons in a town, of the same name for which votes are given, one of whom is constitutionally eligible, and the other not so, and the former is admitted to be the person for whom the votes are cast, the votes will be presumed to be intended for him. *Lynn*, 236.
2. Whether votes for persons, not eligible as representatives, can be considered and counted as votes, in determining the whole number cast—*Quære*. *Attleborough*, 254.
3. A vote for a candidate who is constitutionally ineligible is not to be counted. *Somerset*, 576.
4. On the practice of the senate and house, when electing to certain offices, in joint ballot, of rejecting votes for ineligible persons. *See Report of the Committee on Elections*, 496.

See MEMBERS, I., 3, 5, 8, 12, 13, 14, 15.

INHABITANCY.

See DOMICIL; ELECTORS, I.; MEMBERS, II.

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES.

See MEMBERS, IV., 4.

JUDGE OF PROBATE.

See MEMBERS, IV., 7.

JUSTICE OF THE PEACE.

See TOWN-MEETING, &c.

LARCENY.

See MEMBERS, I., 15.

LANDS CEDED TO THE UNITED STATES.

See ELECTORS, I., 2.

LEGISLATURE. CONSTITUTIONAL POWER OF.

See RIGHT OF REPRESENTATION, 7, 8, 9, 10.

LITERARY INSTITUTIONS.

See STUDENTS, &c.

MAJORITY OF VOTES.

See BALLOT, 3; ENVELOPE, 3; MEETING, VIII, 3, 5; VOTES, RECEIPTION OF, &c., 1, 2, 4, 5, 6, 7, 8.

MAKING CERTAIN A VOTE.

See MEETING, VII., 7, 8, 9; MODERATOR.

MAYOR AND ALDERMEN.

1. Under the statute of 1833, c. 68, (Rev. Sts. c. 4, § 11,) and the twenty-third chapter of the charter of the city of Boston, it is an indictable offence for the mayor and aldermen of the city to omit, through carelessness, to return any votes cast at an election of a member of congress in said city. *Commonwealth* v. *Mayor and Aldermen of Boston*, Thach. Cr. C. 298.
2. Under the sts. of 1833, c. 68 and c. 141, and the twenty-third section of the charter of the city of Boston, the mayor and aldermen of the city may make up their certificate of votes cast at an election of a member of congress in said city, at any time within ten days after the day of the election. *Ib.*
3. Where the mayor and aldermen of the city of Boston had returned a certificate of the votes cast in said city, at an election of a member of congress, to the governor and council, and before ten days after the day of the election had elapsed, an error in such return was discovered; it was held, that, under the city charter, and the statutes of 1833, c. 68 and c. 141, the return might be amended at any time within the ten days. *Ib.*
4. Where, in the trial of an indictment against the mayor and aldermen of the city of Boston, for neglect in omitting to return certain votes to the governor and council, which were cast in said city, at an election of a member of congress, it appeared, that, after one certificate of the votes had been returned, an error had been discovered therein, and an amended certificate returned which had been rejected by the governor and council, and retained by them unopened; it was held, that such rejected certificate was admissible, and should be taken from the secretary of the commonwealth and opened by the court. *Ib.*
5. In such case, it was also held, that the report of the committee of the governor and council, to whom such amended certificate had been referred, was legal evidence of the existence of the second certificate, and of the time of its delivery and rejection. *Ib.*
6. The mayor and aldermen of the city of Lowell having declined to correct a mistake, in the statement of votes for representatives returned from one of the wards therein, on being furnished with an amended return by the ward officers; but, having adjudged, that no election had been effected, and thereupon ordered a new election; and it appearing that upon the corrected return, an election did in fact take place, the house admitted the members so elected. *Case of James K. Fellows and others*, 633.

See also *Commonwealth* v. *Ayer and others*, *Supplement*, 674.

See RECORD, 4.

MEETING FOR ELECTION.

I. *Time of.*
II. *Warrant for.*
III. *Notice of.*
IV. *Adjournment of.*
V. *Opening and Close of Poll at.*
VI. *Proceedings at.*
VII. *Conducting of.*
VIII. *Receiving, Sorting, Counting, and Declaring the Votes.*

I. TIME OF.

1. Where a meeting was held on the second Monday of November, for the choice of representative, &c., at which meeting it was voted not to send, and then the meeting was dissolved; and the selectmen, at the written request of the requisite number of the freeholders, called another meeting for the choice of representatives, on the fourth Monday of November, at which meeting an election was effected; it was held, that, by the proceedings of the first, and the request for the calling of a second meeting, such a second meeting was made "necessary for the choice of representatives," within the meaning of the tenth article of the amendments to the constitution. *East Bridgewater*, 272; *Gill*, 274.
2. Where an election took place on the second Monday of November, and the member elect declined the office, and notified the selectmen thereof, it was held, that a second meeting for the choice of a representative had thereby become necessary, and might be lawfully held on the fourth Monday. *Bedford*, 351; See also *Supplement*, 717.

3. It is no objection to an election on the fourth Monday of November, that the meeting on the second Monday was adjourned to the next day, but was not adjourned again to the next succeeding day. *Braintree*, 395.
4. Where, in the warrant for a town-meeting on the second Monday of November, the subject of a choice of representative is wholly omitted, this is a sufficient cause for calling a meeting for the choice of representative on the fourth Monday. *Erving*, 508.
5. It is not necessary to the validity of a meeting for the election of a representative, on the fourth Monday of November, that a petition should be previously presented to the selectmen to call the same, or that they should state any reason, at the opening of the meeting, for having called it. *Otis*, 665; *Gill*, 274.

See MEMBERS ELECT, 2.

II. WARRANT FOR.

1. Where a meeting for the choice of a representative was held under a warrant containing only one article, namely, "to choose a representative," it was held, that the town had no authority to vote not to send a representative, and that an election after such a vote was valid. [But see the opinions of the justices of the supreme judicial court, 1810–11, and 1815–16.] *Westminster*, 32.
2. The selectmen of a town having issued a warrant for a meeting for the transaction of certain town business, and also for the choice of a representative, and the same having been served according to its direction; one of the selectmen, afterwards, and before the meeting, with the assent of another, inserted a new article in the warrant, previous to the article for the choice of representative, "to see if the town would send a representative;" a meeting was held accordingly, at which it was voted not to send, and the town refused to reconsider that vote; the selectmen then called upon the inhabitants to bring in their votes for representative; several brought in their votes accordingly; some refused to do so; others withdrew from the meeting; and on the third balloting an election was effected. It was held, that the election was valid. [But see the opinions of the justices of the supreme judicial court in 1810–11, and 1815–16.] *Topsham*, 43.
3. Where it was alleged against an election, that neither the warrant for calling the meeting, nor the notification thereof by the constable, contained any statement of the hour of the day on which it was to be held; and it appeared that one of the selectmen, after service of the warrant, altered the same by inserting the hour of the day therein, and directed the constable to make out a new notification, or alter the old one, which was done accordingly two days before the meeting; it was held that the allegation against the election was not supported. *Tisbury*, 60.
4. It seems, that where a second meeting for the choice of a representative becomes necessary, the neglect of the selectmen to state, in their warrant for calling such meeting, from what cause that necessity has arisen, does not affect the validity of an election made at such meeting. *Bedford*, 351.
5. The neglect of selectmen to specify, in their warrant for a meeting for the choice of representatives, the time at which the poll is to be opened, (according to the act of 1839, c. 42, § 2,) is not sufficient to invalidate an election made at such meeting. *West Boylston*, 394; *Coleraine*, 517.
6. An article in the warrant, for calling a meeting for the choice of representatives, "to determine the number of representatives the town will choose to represent them, at the general court, to be held at Boston on the first Wednesday of January next," is sufficient to authorize the choice of representatives. *Upton*, 403.
7. If the choice of a representative is stated in the warrant for a town-meeting, the town may properly entertain any motion in relation to that subject; and a motion to reconsider the vote of a former meeting, to send a representative, is incidental thereto, and is in order, before the poll is opened. *Chelsea*, 474.
8. The omission, in a warrant for a meeting for the choice of representative, of an article to determine whether the town will elect one, will not preclude the town from voting upon that question, and, therefore, will not invalidate an election, effected at a meeting held under such warrant. *Case of James M. Freeman*, 543.
9. The second section of the act of 1839, c. 42, providing that the warrant, for notifying a meeting for the choice of certain officers, shall specify the time when the poll shall be opened, is to be considered as directory to town officers; and the omission of such specification in the warrant subjects the selectmen to the penalty provided in the act; but, except in cases of fraud, will not invalidate an election made at a meeting held in pursuance of such warrant. *Ib.*
10. The warrant and notices, for a meeting for the election of representative, which were dated on the 16th of November, 1850, having directed the electors to meet on Monday, the 25th of November *next*, "to choose a representative to represent them in the general court, to be held at Boston, on the first Wednesday of January next"; it was held, that the informality of the warrant and notices was not sufficient to invalidate an election on the 25th of November, 1850. *Hanover*, 592.

See ELECTION, 4; EVIDENCE, 15; MEETING, I., 4, 5.

III. NOTICE OF.

1. Of notice of town-meeting. *Holliston*, 16; *Danvers*, 31; *Rehoboth*, 127.
2. Where a town has passed no vote particularly specifying the manner in which meetings shall be notified, the notice of a meeting is to be given according to usage. *York*, 139.
3. Where warrants, calling a meeting for the choice of representatives, were dated on the 5th of May, were delivered to constables for service between the 5th and 9th, and were returned on the 10th, having been served by printed notifications left at the houses of the inhabitants on the 10th; and it did not appear that the town had ever passed any vote establishing the manner in which meetings should be called, or that there was any uniform usage therein as to the same; it was held, that the notice of the meeting in question was reasonable and sufficient. *Roxbury*, 157.
4. A by-law of a town having provided, that town-meetings should be warned "by posting up a copy of the warrant fourteen days, at the least, at the public meeting-house, except on special occasions, and then to be warned by the constable," it was held, that the election of a representative, on the fourth Monday of November, was such a "special occasion," and that seven days' notice of the meeting, in such case, was sufficient. *Orange*, 301.
5. Where there is no by-law in a town, prescribing the manner and time of giving notice of its meetings, no usage can be set up to have the force of law, and to annul any meeting opposed to it, unless that usage be ancient, and so well established, and so precise and definite, that all the inhabitants may be presumed to know the exact force of the usage, as they would of a law, if one existed, and to know, also, clearly and certainly, when the town-meeting conformed to and when it violated the usage. *Braintree*, 395.
6. Where the by-laws of a town required notices of town-meetings to be served by posting up "attested copies" of the warrant therefor, and the notices for a particular meeting were signed by the constable, and communicated the substance of the warrant with reasonable certainty, and in a form which had been adopted on previous occasions, though such notices were not, in a technical sense, attested copies, and indeed contained no definite proposition whatever, if grammatically considered; an election, made at the meeting so notified, was held valid. *Clarksbury*, 514.
7. The neglect of the officer, who served the notice for a town-meeting, to state in his return that he had served it in due season, appears to have been deemed immaterial to the validity of an election effected at such meeting. *Ib.*
8. Where the usual mode of warning town-meetings was by posting up notice on the meeting-house, which was used for a town-house, and the meeting-house having been pulled down, a meeting was warned by posting up notice at the house of an individual, and afterwards a town-house having been built in connection with a new meeting-house, and no mode of notifying having been agreed on by the town, notice of a meeting was posted on the town-house, it was held that such meeting was duly warned. *Briggs*, v. *Murdock*, 13 Pick. 305.
9. Where the direction to the constable, in a warrant for calling an annual town-meeting, was, to warn by posting up notice, and he returned, "pursuant to the warrant I have notified," &c., without saying how, the return was held to be sufficient evidence that the meeting was legally warned. *Ib.*
10. So of a return by the officer, that he had notified the inhabitants "as the law directs." *Ib.*
11. So of a return without date, "agreeable to the within warrant I have notified the inhabitants of, &c., of the time, place, and purpose of the within meeting." *Ib.*
12. When a warrant for a town-meeting, to be held on Monday, directs the officer to warn the inhabitants by posting up a copy of the warrant eight days, and at least over two Sundays, before the time of holding the meeting, the return of the officer, that he posted up a copy of the warrant eight days, before the time of holding the meeting, is sufficient; as the return shows that the copy must have been also posted over two Sundays. *Commonwealth* v. *Shaw*, 7 Met. 52.
13. When a warrant for a meeting of the inhabitants of the town of A. is directed for service, to F., constable of the town, his return of proper service is sufficient, if it be signed, "F. constable," without adding "of A." *Ib.*

See EVIDENCE, 2; TOWN AND DISTRICT.

IV. ADJOURNMENT OF.

1. Selectmen, after an adjournment of a town-meeting, may change the place for holding the adjourned meeting. *Harwich*, 38.
2. The selectmen have no authority, at their discretion, to adjourn a town-meeting, without a vote of the meeting; and if such an adjournment takes place, while an election is in progress, and before it is completed, it cannot be legally completed at the adjourned meeting. *Adams*, 326.
3. The constitution does not admit of an adjournment of a meeting for the choice of representatives, which it provides for being held on the fourth Monday of No-

vember, to a day beyond the said fourth Monday. *Mendon*, 389; *Opinion of the Justices*, 407.
4. It is competent for a town-meeting, after having voted not to send representatives, to adjourn to the next day, for the purpose of reconsidering that vote; and an election of representatives, effected at such adjourned meeting, without any further vote on the reconsideration, is valid. *Upton*, 403.
5. A meeting for the choice of representatives may be adjourned from the place where it was originally called to some other place. *Ib.*
6. Meetings for the choice of governor, lieutenant-governor, and senators, cannot be adjourned to a subsequent day. *Opinion of the Justices*, 407.

See ELECTION, 2; MEETING, I., 3; VII., 15; TOWN CLERK, 3.

V. OPENING AND CLOSE OF POLL.

1. A delay of more than two hours, after the time appointed, to open a meeting for the choice of a representative, was held to be no objection to the validity of the election. *Standish*, 82.
2. Reasonable notice, either expressed, or implied from previous usage, must be given of the time, when the poll, for choice of representative, will be closed. *Gloucester*, 207.
3. Where the usage had been to close the poll at four o'clock, P. M., on the day of election, and the selectmen gave notice, after counting the votes cast, at about twelve o'clock, that the poll would close at half past twelve; and, after refusing to put a motion, duly seconded, to keep it open until four o'clock, did in fact close it at a quarter past one; and it appeared, that this was done in accordance with the previous determination of the selectmen, expressed before the meeting, to members of the political party to which they as well as the member returned belonged, and to no others; it was held, that the election was void. *Ib.*
4. A meeting for the choice of representatives being opened at half past twelve, M., and kept open until three, P. M., in a town entitled to but one representative; it was held, that the poll was not unreasonably closed. *Tyringham*, 266.
5. Where a meeting for the choice of a representative, in a town entitled to one member, was opened punctually at the time stated in the warrant, and the poll was kept open from twelve to twenty minutes, and until all persons present, having a right to vote, and desirous of doing so, had voted; it was held, that the poll was not unreasonably closed, although several persons, who had lingered outside of the place of meeting, in the expectation that it would not be opened until from one-quarter to three-quarters of an hour later, which was the most usual time, were thereby prevented from voting. *Phillipston*, 269.
6. The fact, that the poll was kept open until after sunset, is not sufficient, of itself, and in the absence of fraud, to set aside an election. *Adams*, 391.
7. Where a meeting was warned for three o'clock in the afternoon, and the poll was closed in less than two hours, these circumstances were not considered sufficient, in the absence of a fraudulent intent, to invalidate the election. *Warwick*, 401.
8. Where a meeting for the choice of representatives, which was fully attended, refused at a late hour to dissolve, but proceeded to ballot again, and the selectmen, after the lapse of from twenty to thirty minutes, closed the poll, just before the sun was set; it was held, that the conduct of the selectmen, in thus closing the poll, furnished no evidence of an intention on their part to prevent electors from voting. *Rowley*, 456.
9. An election, which takes place at a meeting, the warrant for calling which does not specify the time of opening the poll, and at which the poll is not kept open two hours, as required by statute 1839, c. 42, § 2, is void. *Easthampton*, 471.
10. An election, at which the poll is not kept open two hours, is void. *Hawley*, 501.
11. If, after the closing of the poll, objection is made that it has not been kept open two hours, and persons claim a right to vote, the poll may be opened again by a vote of the town, for the purpose. *Spencer*, 507.
12. An election, effected at a balloting which commenced after sunset, was held void, under the act of 1839, c. 42, § 3. *Burlington*, 460; *Charlestown*, 518.
13. The act of 1843, c. 94, in addition to the act of 1839, c. 42, "concerning elections," did not repeal the third section of the latter. *Charlestown*, 518.
14. Under the statute of 1839, c. 42, "concerning elections," an election made at a second balloting, at which the poll is kept open after sunset, is void. *Sandwich*, 523.
15. At a meeting for the election of representatives, held subsequently to the passing of the act of 1843, c. 94, the poll was opened at 9 o'clock in the forenoon, and kept open, by a vote of the meeting, until after sunset; it was held, that the election was not thereby invalidated. *Fall River*, 533.
16. If it appears from the evidence, that the poll was closed before the close of the meeting, it may be inferred, in the absence of counter evidence, that it was legally closed by a vote of the town. *Case of James M. Freeman*, 543.
17. Under stat. 1844, c. 78, the poll is to be considered as opened, when the ballot-box is presented to the voters, and

they are called on to prepare their votes for a balloting. *Dana*, 551.

18. The poll is not opened in a disorderly manner, merely because there is considerable noise and disorder, at the time, provided there is no improper voting. *Sterling*, 589.

See EVIDENCE, 11; MEETING, II., 9; MEETING, VIII., 7, 12, 13, 15; PRACTICE, 16.

VI. PROCEEDINGS AT.

1. At a meeting for the election of representatives, the votes were brought in with some confusion and disturbance; the right of several persons to vote being questioned, after they had voted, one of them qualified himself by taking the oath, others refused to qualify themselves or to withdraw their votes, and one offered to withdraw his vote, but refused to state for whom he voted; and it was thereupon voted, that the whole matter should subside, upon the last mentioned voter's withdrawing his vote, which was done accordingly; it was held, that these irregularities were not sufficient to invalidate the election. *Hopkinton*, 26.
2. Meetings for the transaction of town business, and for the choice of a representative, being notified and held on the same day; the moderator of the town-meeting and the selectmen presided alternately, as questions were brought forward, relating to town-business, or to the choice of a representative; it was held, that the election was not invalidated. *Franklin*, 52.
3. It was held no objection to the validity of an election, that a moderator was chosen and presided therein, instead of the selectmen. *Hope*, 71.
4. A warrant for calling a meeting for the election of a representative specified 10, A. M., as the hour at which the meeting would be opened, and the weight of evidence was deemed to be, that the meeting was not opened before that time. After the meeting was called to order, a motion not to send a representative was made, on which the selectmen declared the vote to be a tie; but after a conference with the town clerk, who had also counted and found the vote to be against sending, put the question again, and declared the result to be a vote not to send. One, who had voted in the minority, then moved to reconsider this vote. Pending a discussion of his right to make the motion, a motion was made to dissolve the *warrant* and carried in the affirmative. This vote was doubted, but no notice was taken of the doubt; and the selectmen retired from the desk. A moderator was then chosen and an election had, of which the result was declared to be the choice of a representative, whose election was certified by the moderator, and by four persons who acted as his assistants. It was held, that such election was void. *Case of Dan Hill*, 558.
5. An election having been duly effected in a town entitled to only one member, the selectmen, at the request of certain of the inhabitants, called a subsequent meeting for the choice of a representative, of which less notice was given than the by-laws of the town required; at such meeting, votes for a representative were thrown upon the selectmen's table, in an irregular and disorderly manner, and without being called for, and were sorted and counted by the selectmen, who refused to state for what purpose they were given, or to declare the result; it was held, that the person, who received a majority of the votes so brought in, was not duly elected. *Dresden*, 151.
6. The question, what number of representatives a town will send, cannot be determined by requiring the voters to bring in their votes for such number of representatives, not exceeding the number to which the town is entitled, as they shall respectively think proper. *Roxbury*, 157.
7. A town having voted, at a legal meeting for the choice of representative, not to elect, and dissolved the meeting, a second meeting was called for the same purpose, at which a motion not to send was made and seconded, and declared, upon a division of the meeting, to be decided in the affirmative. A motion was then made and seconded to dissolve the meeting; immediately after which, the vote not to send was disputed. The selectmen refused to put the motion to dissolve the meeting; but a motion to send a representative being then made, seconded and carried, an election was thereupon effected. It was held, that such election was void. *Southbridge*, 215.
8. A town, having voted to send one and but one representative, at a meeting held for the choice of one or more representatives, may lawfully reconsider that vote, and elect an additional member, after having chosen one. *Lynn*, 236.
9. The inhabitants of a town entitled to send two representatives having voted, at a legal meeting for the purpose, to elect only one, the selectmen proceeded to receive the votes accordingly. While the balloting was going on, it was, on motion, voted to reconsider the first vote, and to elect two representatives. The balloting was then resumed, and an election of one member was effected. The selectmen then proceeded to receive votes for a second representative; and one being chosen, it was held, that the election of such member was valid. *Hadley*, 233.
10. If the proceedings at an election are conducted in a loose and improper manner, and in a way to open a door for fraud and collusion; yet if no fraud or collusion is proved to have been prac-

tised, the election will not be void. *Lynn*, 281. See also *Danvers*, 31.

11. If the inhabitants of a town vote, previous to balloting for a representative, to dispense with the check list, an election effected at such balloting is void. *Princeton*, 422.

See MEETING, II., 1, 2, 6, 7, 8, 10; RIGHT OF REPRESENTATION, 3, 4.

VII. CONDUCTING OF.

1. At a meeting for the choice of one or more representatives, the selectmen stated that the town was entitled to four, and called on the voters to bring in votes for from one to four. A motion was made and seconded to send two and no more, and this the selectmen, as they had previously determined, refused to put or to permit debate upon. Great excitement followed this decision, in the midst of which a motion to adjourn was made and seconded, but the selectmen refused to put it, one of them giving as a reason for such refusal, that there were votes in the ballot-boxes. Many voters left the meeting, and others refused to vote. Four persons were declared elected. It was held, that the election was not free, and, therefore, void. *Roxbury*, 157. See also *Rehoboth*, 127.
2. At a meeting for the choice of a representative, the selectmen refused to put or hear debate upon a motion, regularly made and seconded, that no representative should be sent, and ordered the voters to bring in their votes. The voters insisting upon their right to debate the motion, the chairman of the selectmen ordered the sheriff to read the riot act, which was done, and thereupon about half of those present left the meeting. During these proceedings and afterwards votes were received, being handed from one to another till they reached the ballot-box. An election so made was held void. *Nantucket*, 180.
3. It is the duty of selectmen, presiding at a meeting for the choice of representatives, to give a reasonable time, before proceeding to the election, for the town to exercise its corporate right, to determine whether any and how many members shall be chosen; and if they do not allow such reasonable time, but proceed with the election, notwithstanding a motion made and seconded, as to the number to be chosen, the election will be void. *Boston*, 221.
4. It is the duty of selectmen, before proceeding to an election, to allow reasonable debate upon, and a fair discussion of, the question, to what extent the town will be represented, provided such debate and discussion are offered;—otherwise the election will be void. *Charlestown*, 226.
5. Where an election was controverted, on the ground, that previous to the balloting, at which it took place, a motion was seasonably made and seconded, not to send a representative, which motion the selectmen refused to put, but proceeded with the election; and the committee on elections reported thereon, upon the evidence, that the motion was seasonably made, and not being put by the selectmen, the election subsequently effected was void; a minority of the committee submitted a report, concluding, that the motion was not seasonably made; but that if it was, the election ought not to be thereby rendered void; and, consequently, that the petitioners have leave to withdraw their petition. The house amended the report of the committee, by substituting for the conclusion thereof the conclusion submitted by the minority; and the report, as amended, was agreed to. *Plympton*, 612.
6. A reasonable time ought to be allowed, after a meeting for the choice of a representative is opened, to make, discuss and determine, a motion to send or not to send, especially where a town is not constitutionally entitled to send a representative every year; and if such reasonable time is not allowed, an election subsequently effected will be void. *North Chelsea*, 644.
7. A motion being made in town-meeting not to send a representative, and declared to be decided in the affirmative, the vote was doubted, and the selectmen proceeded to make it certain by polling the meeting, and thereupon declared that the motion was decided in the negative. It was held not to be necessary for the selectmen, after this declaration, to call the list and check the names of those who voted on the question, though they were requested so to do; especially as such had not been the practice. *Ashburnham*, 264.
8. At a meeting for the choice of representatives, it was voted to send four, and to elect them at separate ballotings. After two had been chosen, a motion to adjourn was made, seconded, put to vote, and declared to have been decided in the negative. The vote being doubted, the question was again put and declared in the negative. The vote was then doubted by more than seven voters, who demanded a division. At this time there was great confusion in the hall, and the division was refused by the selectmen, on the ground, that the same persons who asked it had refused to take the required and proper measures to be counted on a previous division, at the same meeting. A large number of voters then withdrew, and two representatives were chosen by a smaller number of votes, than had been necessary to a choice at either of the previous ballotings. It was held, by the committee on elections, and so reported by them, that the election of

these two was void; but the report was rejected by the house. *West Springfield*, 278.

9. A vote to dissolve a meeting having been doubted, and the doubt settled by a show of hands, the vote was again declared in the affirmative, the meeting not objecting to this mode of settling the doubt. The doubt being again renewed, the presiding officer put the question a third time, and declared it to be decided in the negative, upon a count of the voters present taken by him. It was held, that an election which took place after this proceeding, was not thereby invalidated. *Charlestown*, 578.
10. A neglect of the selectmen, presiding at an election, to call and check the names of the persons voting therein, as required by the statute of 1813, c. 68, § 4, was held not sufficient to invalidate the election. *Marblehead*, 295.
11. The fact, that the check list is not used, is not sufficient to set aside an election, provided such neglect does not occasion the reception of an illegal, or the rejection of a legal, vote. *Westborough*, 392.
12. An election, which was made without checking the names of the voters, was held void, although it appeared, that the selectmen knew every man, whose name was on the list, and stood by the box during the balloting, with the list before them, and made oath, that no person voted in the election, whose name was not on the list, and had not been called at the previous balloting. *Granby*, 506.
13. A meeting being held for the election of a representative, three ballotings took place, at the last of which an election was effected. At the first balloting, the names of all persons who voted were checked, according to the statute. At the two last ballotings, the names were not checked, but the list was held by one of the selectmen, and so far used, that no person was permitted to vote, until it was ascertained that his name was on the same; it was held, in the absence of all fraud, or double voting, that the neglect to use the check list did not invalidate the election. *Needham*, 597.
14. A decision of the presiding selectman, not dissented from by his brethren, at a meeting held for the choice of representatives, is the decision of the whole board. *Charlestown*, 226.
15. It is an irregularity, for the selectmen to refuse to put a question of adjournment, regularly moved and seconded, but not sufficient of itself to set aside an election. *Adams*, 339.
16. The presiding selectman, at a meeting for the choice of representatives, having suppressed debate on a motion, "to proceed to another ballot," which he did not hear made; it was held, that such suppression was not improper. *Sterling*, 589.
17. At a meeting for the election of a representative, held on the fourth Monday of November, the selectmen refused to put a motion, properly made and seconded, to dissolve the meeting, but proceeded to call for and receive votes for a representative; it was held, that an election, so effected, was void. *Otis*, 665.
18. Whether it is any objection against the validity of an election, that the votes were given in without the list of voters being called; that persons were allowed to vote, whose names were not on the list; and that some of the voters, whose qualifications were questioned, were allowed to withdraw their votes—*Quære*. *Windsor*, 250.
19. Where an election was effected at a meeting, which was irregularly notified, and held at an inconvenient hour, and at which no list of voters was produced; it was held, that such election was nevertheless valid. *Paris*, 45.

See ENVELOPE, 1, 2, 3, 4; TOWNS UNITED; VOTERS, LIST OF.

VIII. RECEIVING, SORTING, COUNTING, AND DECLARING THE VOTES.

1. The petitioners against an election having alleged that the same was void, on the ground, that the member returned did not receive a majority of the votes, and that the selectmen retired by themselves to sort and count the same; and it appearing in evidence, (which was not alleged in the petition,) that there was no list of voters produced at the meeting, and that the selectmen, after receiving the votes, retired into the pulpit of the meeting-house in which the election was held, and, with the town clerk, there sorted and counted the votes; but it did not appear, that the votes were given in, as set forth in the petition; it was held, that the election was good. *Bath*, 51.
2. Where the votes are given in, or are sorted, dealt with, and counted, in such a manner, that the whole number of voters cannot be ascertained, the election is void. *Wrentham*, 70.
3. If in consequence of electors voting twice either intentionally or by mistake, it becomes uncertain whether the person declared to be elected received the votes of a majority of the voters then voting, the election is void. *Dighton*, 175.
4. A town having voted to send six representatives to be voted for on one ticket, some of the electors brought in their ballots for the whole number; some for a less number; some six separate ballots with one name on each; and one voter, after having carried in a ballot with one name on it, carried in a second with five names on it. After the votes were thus received, they were cut and

severed before they were counted. It was held, that the manner, in which the votes were received, dealt with and counted, rendered it impossible to determine the number of persons, who voted in the election, and that the election was therefore void. *Newbury*, 191.
5. The selectmen having inadvertently omitted to count a considerable portion of the votes given in at an election, in consequence of which it became impossible to ascertain whether or not the members returned received a majority of all the votes, the election was held void. *Andover*, 205.
6. If one, who is not a legal voter, throws a vote into the ballot-box, before the presiding selectman has time to forbid him, it is the duty of such selectman to withdraw the vote from the box. *Berkley*, 257.
7. The receiving of votes, after the poll is closed, if irregular, is not, it seems, sufficient to invalidate an election, unless the result is thereby affected. *Pelham*, 262.
8. Where the selectmen, in the honest belief that illegal votes had been received, overturned the box and scattered the votes, and commenced the balloting anew; it was held, that this was not such an irregularity as would avoid an election subsequently effected. *Chatham*, 423.
9. The overturning of the ballot-box, and thereby breaking up a balloting which had commenced, under a belief, on the part of the selectmen, that a person had voted twice, is an irregularity; but if done without any fraudulent purpose, and especially if it receives the tacit assent of the electors, and is further acquiesced in by a vote not to dissolve the meeting, it is not sufficient to invalidate an election subsequently effected. *Rowley*, 456.
10. Three ballots having been found in the ballot-box, bearing the name of the same candidate, and so folded and doubled together, as to satisfy the selectmen that they were all put into the box by the same person, the selectmen thereupon rejected two of them and counted the third; and there being no evidence to contradict the conclusion of the selectmen, or to impute any unfairness to them, the house refused to set aside the election on the ground of such rejection. *Dartmouth*, 465.
11. A meeting being called and held for the election of state officers, to be voted for on one ballot, and of a representative in congress, to be voted for on another ballot, and in separate boxes appropriately labelled, the selectmen gave notice, that votes found in the wrong box would not be counted; it was held, that a vote for representative in congress, found in the box appropriated to the votes for state officers, was rightly rejected. *Fairhaven*, 492.
12. After the result of an election has been declared, it is proper for the selectmen to add to the whole number of votes one that has accidentally escaped notice, and thereupon to make a new declaration, although the result of the election is thereby changed. *Case of James M. Freeman*, 543.
13. It seems, that a ballot deposited after the result of a balloting has been ascertained, though not declared by the presiding selectman, is not to be counted. *Dana*, 551.
14. It is clearly contrary to the express provisions of law, to delay the public declaration of the result of a balloting, after the votes have been counted, and the result ascertained. *Ib.*
15. It is improper to allow any one to vote after the ballot-box has been turned. *Ib.*
16. Where it clearly appears, that a voter deposited a vote for one person, by mistake, intending to vote, and supposing that he did vote, for another, it seems that such vote is not to be counted. *Somerset*, 576.
17. It is the duty of selectmen, with the assistance of the town clerk, to receive, sort and count the votes, at an election for representative; but if they call in the assistance of other persons, in the performance of this duty, that circumstance will not, of itself, invalidate an election. *Chester*, 664.

See ENVELOPE.

MEMBER ELECT.

1. Where a member elect, being present at the meeting, declines to serve, and notifies the meeting thereof, the town may, it seems, proceed to a new election. *Southbridge*, 215. See also *Supplement*, 717.
2. A member elect having died before the meeting of the legislature, but so soon previous to the fourth Monday of November, that there was not sufficient time to give the notice required by the by-laws of the town for a meeting on that day, without posting up the notice on the Lord's day, the house issued a precept to the town for a new election. *Selectmen of Sherburne*, 362.

See MEETING, I., 2.

MEMBER, STATEMENT OF.

See EVIDENCE, 1, 19.

MEMBERS.

See COUNCIL; PRACTICE, 9.

MEMBERS ELECT OF CONGRESS.

See MEMBER, IV., 6.

MEMBERS, QUALIFICATIONS OF.

I. *As to Conduct and Character.*
II. *As to Residence.*
III. *As to Property.*

IV. *As to Incompatible Offices or Employments.*

I. CONDUCT AND CHARACTER.

1. Conduct and character of members inquired into. *Case of James Perry*, 2; *Vassalborough*, 4; *Case of Abiel Wood*, 12.
2. Where a petition was presented against a member, praying that he might be excluded from the house, on the ground of his being "inimical to the government," and evidence was given in support of the charge, it was ordered that such member withdraw from the house, and that the case be heard, upon evidence to be produced by the parties, at the next session. *Vassalborough*, 5.
3. A member, disqualified "from holding any post of honor or profit," by a resolve of a former general court, is thereby rendered ineligible. *Swansey*, 8.
4. The seditious conduct of a member is not sufficient ground for his expulsion. *Case of Silas Fowler*, 9.
5. A member, who had been excluded from the house at the first session, as a person incapable of being a representative, being elected and returned as a member at the second session, it was held, that, by such exclusion, he was rendered incapable of holding a seat in the house for the same general court. *Case of John Williams*, 10.
6. Character and conduct of member.—Neglect of member to appear in his place, when ordered by the house considered as a contempt, and member expelled. *Case of Abiel Wood*, 12.
7. Where it appeared, that a member was under an indictment "for seditiously and riotously opposing the collection of public taxes," it was ordered, that his right to a seat be suspended, until he should have his trial on the indictment. *Case of Jeremiah Learned*, 14.
8. It being alleged against a member returned to the general court for the year 1784–5, that he had been reported to be an enemy to the country, during the late war; that he had refused to aid in carrying it on; and that he had said he hoped Great Britain would conquer this country; it was held, that if these facts were proved, they would not render the member ineligible, or justify the house in excluding him from a seat. *Kittery*, 15.
9. Where it appeared that a member of the house in 1785–6 had been indicted in 1783, for the part he had taken in the then late war with Great Britain, in favor of the latter, and had been discharged from such indictment, as justly entitled to the benefit of the sixth article of the treaty of peace; it was held, that the member's right to a seat was not thereby invalidated. *Case of John Williams*, 19.
10. A member convicted of sedition, and sentenced to an ignominious punishment, expelled. *Case of Moses Harvey*, 23.
11. Where a member was charged with being under an indictment for seditious practices, and with being under bond, &c., the house refused to suspend him from acting as a member, until the indictment should have been determined. *Charlton*, 24.
12. Eligibility of a member, who had been impeached for corrupt and wilful misconduct as a magistrate, and found guilty. *Watertown*, 36.
13. A member, who had been convicted of forgery, and sentenced to pay a fine therefor, ten years previous to his election, but had not been pardoned, or procured a reversal of the judgment, was excluded from his seat. *Ludlow*, 40.
14. Member convicted of forgery suspended from acting. *Case of John Waite*, 60.
15. Where a member had been convicted upon an indictment for larceny, and the verdict had been set aside, a new trial granted, and the indictment afterwards quashed for informality:—the conviction was held not to disqualify him. *Falmouth*, 203.

II. RESIDENCE.

1. The removal of a member, from the town for which he is elected, to another town within the state, does not disqualify him from holding his seat for the residue of the term. *Case of Elbridge Gerry*, 23; *Coleraine*, 436.
2. Removal of a member from the commonwealth, to another state, disqualifies him from further holding a seat as such. *Case of Emory Burpee*, 359; *Case of John Shepley*, 243. See also *Case of Daniel Merrill*, 175.
3. It seems, that the requisition in the constitution, that every member of the house, for one year, at least, next preceding his election, shall have been an inhabitant of the town which he is chosen to represent, is not complied with, unless the member is also a citizen during the whole of that time. *Malden*, 377.
4. Where a member, who had removed his residence from the town, for which he was elected, on the 18th of March preceding his election, and had removed back to the same on the 5th of October following, was elected as representative for such town, at the succeeding general election in November; it was held, that he had not been an inhabitant of the town for a year preceding his election. *Case of William C. Brown*, 405.
5. R. was an inhabitant of the town of P. on the twentieth day of April, 1847. He, then being the lessee of a public house in the city of B., and liable for the rent thereof, and finding that his sub-lessee had not paid the rent, went to B., and proceeded to keep the said public house, placing his sign upon its front, and having the principal part of his family with him, but at all times preserving the intention to dispose of his

lease, upon the occurrence of a good opportunity to do so, and returning to P. While keeping the house as aforesaid, he was chosen a representative of the town of P. It was held, that he was an inhabitant of P. and his election valid. *Petersham*, 571.

6. Where a representative, after taking his seat in the house, leaves the commonwealth, without expecting to return before the prorogation of the general court, of which he is a member, a precept will not issue for a new election. *Case of William O. Andrews*, 588.

7. B., a minister of the gospel, having closed an engagement as such in E., where his family continued to reside, went to G. in September, 1849, and after preaching to a society there a short time, made an engagement with a committee of the society, to continue his services until the first day of March, then next, at which time the committee's authority expired. This engagement was made after an unanimous expression of a desire, at a voluntary and informal meeting of the society, that B. should be engaged with a probable view to his settlement for a year from the first of March, as had been the custom of the society. The society, thereupon, gave up a candidate whom they had previously employed, and intended to settle; and B. gave up a partial engagement which he had made to preach with another society. B. was informed by the committee, that the society were well pleased with him, and that his stay with them would probably be permanent, and he expressed his intention to remain. B. preached at G. on the 21st of November, and on three other Sundays in the same month, boarding at the hotel in G., while his family remained in E. During this time B. was looking for a house in G., but had some difficulty in finding one. B. continued to preach in G., to which he removed his family in December, 1849, and was residing there at the time of the general election in November, 1850, when he was elected and returned a member from the town of G. It was held upon the foregoing, which were the principal, facts in the case, that the inhabitancy of B. in G. for a year previous to his election was not thereby disproved. *Georgetown*, 599.

8. The election of one of the members returned from Boston being controverted on the ground of a want of residence, it appeared, that the member, who had been an inhabitant of Boston for many years, had been accustomed to send his family out of town during the summer months, residing there occasionally, and retaining rooms in Boston for his own use. In 1850, the member built a house in Newton, to which his family removed in April, 1851, but he remained in Boston, where he kept rooms for his own use, and also for the occupation of his family when they desired; and he himself occasionally visited his family in the country, when his business would permit; but his expressed intention was to remain an inhabitant of Boston. It was held, that no change of inhabitancy was proved. *Case of Ralph W. Holman*, 647.

III. Property.

1. Qualification of a member as to property.[1] *Truro*, 5. See also *Pembroke*, 21, *Note*.
2. The validity of an election being called in question, on the ground, that the member returned did not possess the requisite qualification as to property, it was held, that the burden of proof was on the petitioners. *Pembroke*, 21; *Dedham*, 182.
3. It was held no objection to the qualification of a member as to property, that he was rated in the valuation at two hundred dollars, personal estate, and no more, and that his real estate (but whether the whole or a part only did not appear) had been set off on execution. *Barre*, 250.

See Evidence, 3; Pecuniary Qualification.

IV. Incompatible Offices or Employments.

1. A minister of the gospel, though exempted as such from taxation, is not ineligible as a representative. *Gray*, 28.
2. Persons holding offices under the government of the United States, similar to those, which, by the constitution of this state, are declared to be incompatible with holding a seat in the legislature thereof, are not eligible as members. 28.
3. The office of district attorney of the United States, for the district of Massachusetts, is incompatible with that of representative in the legislature of this commonwealth. *Case of Christopher Gore*, 29.
4. The office of judge of the district court of the United States is incompatible with that of representative in the legislature of this commonwealth. *York*, 30.
5. Upon a question, whether a member, who held the office of deputy marshal of the district of Massachusetts, under the government of the United States, was not thereby disqualified to hold his seat, the house ordered the subject to subside. 34.
6. Members elect of congress are not thereby disqualified to hold seats as members of the legislature of this commonwealth. 35.
7. A judge of probate, having been elected a representative, and resigned his office

[1] By the thirteenth article of the amendments to the constitution, it is provided, that "no possession of a freehold, or of any other estate, shall be required, as a qualification for holding a seat in the house of representatives."

of judge, after the commencement of the session, was held to be entitled thereby to take his seat as a member. *Sullivan*, 39.

8. The office of commissioner of bankrupts, under the first bankrupt law of the United States (act of 1800, c. 19), was held not to be incompatible with that of representative. *Case of Jonathan L. Austin*, 47.

9. The office of deputy postmaster is not incompatible with that of representative.[1] *Sandford and Alfred*, 55.

10. The office of chaplain in the army of the United States is incompatible with that of representative. *Case of Solomon Aiken*, 194.

11. The office of University Professor of Law, in Harvard College, is incompatible with that of representative. *Case of Asahel Stearns*, 217.

12. A member, who resigned the office of deputy collector of the customs on the day of his election, and afterwards was occasionally employed as an inspector, but at the time of taking his seat held no office in the customs, is not disqualified to sit. *Marblehead*, 235.

13. Where a member in fact performed the duties of a deputy collector of the customs under the United States, from the close of the first session of the general court to the commencement of the second, he was held to be thereby disqualified to hold his seat. *Case of William B. Adams*, 251.

14. The superintendent of a breakwater is not ineligible to the house of representatives, as a person holding office under the authority of the United States. *Barnstable*, 393.

MENDON AND BLACKSTONE.

The act incorporating the town of Blackstone provided, that the town should remain for a certain period a part of the town of Mendon, for the purpose of electing a representative; that the warrants for calling meetings for the election of representatives should specify ten o'clock, A. M., as the hour at which the poll should be opened; and that the poll should be opened accordingly, and closed by one o'clock, P. M. It was held, that it was not necessary that the poll should be opened, but that the voters of the two towns might properly vote not to send a representative, and might thereupon dissolve a meeting called for the election of one. *Case of Dan Hill*, 558.

MEETING-HOUSE.

See MEETING, III., 8.

MINISTER OF THE GOSPEL.

See MEMBERS, IV., 1.

[1] See the eighth article of the amendments to the constitution.

MODERATOR.

Duty of the moderator of a town-meeting to make certain a vote when scrupled or doubted by a competent number of the voters. *Chester*, 238.

See DISORDERLY BEHAVIOR, 2; MEETING, VI., 3.

MOTION.

See PRACTICE, 1, 2, 3.

MOTION TO ADJOURN.

See MEETING, IV., 4; VII., 8, 15.

MOTION AND VOTE TO DISSOLVE.

A vote to dissolve the *warrant* (that being the usual motion in the town) is equivalent to a vote to dissolve the meeting. *Case of Dan Hill*, 558.

See ELECTION, 8; MEETING, V., 8; VI., 3, 7; VII., 17.

MOTION AND VOTE TO SEND OR NOT TO SEND.

See ELECTION, 6; MEETING, I., 1; IV., 4; VI., 6, 7; VII., 1, 2, 3, 4, 5, 6, 7, 16; RIGHT OF REPRESENTATION, 3, 4.

NEGLECT TO APPEAR.

See MEMBER, I., 6.

NOTICE OF PETITION.

See PRACTICE, 11, 14.

OATH.

Where the oath of office is administered to a town officer in open town-meeting, by a justice of the peace, in presence of the town clerk, the clerk's record of the fact is competent evidence of the administration of the oath. *Briggs* v. *Murdock*, 13 Pick. 305.

See SELECTMEN, 1, 2.

OFFICE-HOLDERS UNDER THE UNITED STATES.

See MEMBER, IV., 2, 3, 4, 5, 8, 9, 10, 12, 13, 14.

OFFICER'S RETURN.

See MEETING III., 7, 9, 10, 11, 12, 13.

OFFICES, INCOMPATIBLE.

See MEMBERS, IV.

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, 117, 198, 245, 285, 343, 386, 407, 416, 510, 535, 634, 669.

PAPERS.

See PRACTICE, 10.

PAUPER.

The word "paupers" has acquired a precise and technical meaning, and is understood to designate persons receiving aid and assistance from the public, under the provisions made by law for the support and maintenance of the poor. *Opinion of the Justices*, 285.

See ELECTORS, II., 1, 2, 3, 4, 5, 10; RATABLE POLLS, 10, 12.

PAY.

1. In the following cases, pay was allowed to members, whose elections were adjudged void: *Nantucket*, 180, (for travel only); *Newbury*, 190, (in part); *Case of Solomon Aiken*, 194; *Boston*, 221; *Charlestown*, 226; *Case of Joseph Downe, Jr.*, 244; *Woburn*, 302; *Adams*, 326; *Case of Emory Burpee*, 359; *Barre*, 365; *Case of William C. Brown*, 405; *Princeton*, 422; *Easthampton*, 471; *Granby*, 506; *Charlestown*, 518; *Sandwich*, 523, (including expenses of sickness); *Webster*, 526.
2. In the following cases, pay was refused to be allowed to members whose seats were vacated:—*Milton*, 146; *Case of William B. Adams*, 251; *Attleborough*, 254.
3. Pay allowed to a petitioner, who was admitted to a seat. *Case of James M. Freeman*, 543.

PAYMENT OF TAX.

See ELECTORS, II.

PECUNIARY QUALIFICATION.

One who had *bona fide* received, on the morning of the first Monday in April, two hundred dollars in advance of his yearly salary, was holden to possess the pecuniary qualification required by the constitution to entitle a citizen to vote in the election of governor, &c.[1] *Bridge v. Lincoln*, 14 Mass. 367.

PETITION, WITHDRAWAL OF.

See PRACTICE, 4, 15, 18, 20, 21.

PLACE OF MEETING.

See MEETING, IV., 1, 5.

POLL, OPENING AND CLOSE OF.

See MEETING, V.

PRACTICE.

1. The validity of an election may be inquired into on motion. *Hopkinton*, 6.
2. The qualification of a member, as to residence, may be inquired into on motion. *Dunstable*, 19.
3. The eligibility of a member, as affected by his character and conduct, may be inquired into on motion, and the statement of evidence, by a member. *Case of John Williams*, 19.
4. The house, having received a petition against an election, and assigned a time for the hearing thereof, allowed the same to be withdrawn at the request of the petitioners. *Middleborough*, 25; *Hull*, 667.
5. Election controverted by the selectmen, by whom the return was signed, on the ground, that they had since discovered that illegal voters, sufficient in number to render the election void, had voted therein. *Sheffield and Mt. Washington*, 46.
6. On a petition against an election, alleging irregular proceedings at the meeting at which it took place, the case was postponed, and a commissioner appointed to take depositions in the mean time, at the request of either of the parties. *Rehoboth*, 48. See also *Ashfield*, 583.
7. Where an election was controverted, on the ground of a deficiency of ratable polls, the sitting members were required to lay before the committee on elections, and to furnish the petitioners with, a list of persons whom they alledged to be ratable polls; and the petitioners, within a reasonable time, afterwards, to furnish the members with a list of such persons thereon, as they alleged not to be ratable polls. *Bath*, 73.
8. Where a petition against an election was not committed, until so late a period of the session, that an investigation could not conveniently be had, no order was taken thereon. *Sutton*, 80. See also *Case of Francis J. Oliver*, 435.
9. Members have no right to vote on the question of the validity of their election. *Gloucester*, 97. See also *Notes on pages* 171, 440, 465.
10. Committees of the house should return all papers with their reports. *Belchertown*, 103.
11. A petition against an election was rejected, because not served on the members returned, according to the rule of the house. *Middleborough*, 135.
12. The rules and orders of one house of representatives are not binding upon another. *Milton*, 146.
13. In a discussion of the question, upon the reconsideration of a vote adopting a report, whereby the seat of a member was vacated, it was ruled by the speaker, that evidence might be introduced in support of, but not against, the motion to reconsider. *Case of William B. Adams*, 251.
14. The fact, that no notice has been given to a member returned, prior to the meeting of the general court, of a petition against his election, is not a sufficient ground upon which to refuse a hearing to the petitioners. *Northbridge*, 373.

[1] This decision was before the adoption of the amendments to the constitution in 1820, by the third of which the pecuniary qualification, in the case of electors, was abrogated.

15. Petitioners against an election, not having offered any evidence to sustain their allegations, nor, intending to offer any, had leave to withdraw their petition. *Northampton*, 391.
16. Petition against an election, upon an understanding between the parties, allowed to be withdrawn. *Case of Eliphalet P. Hartshorn*, 405.
17. The petitioners against an election having offered to prove, before the committee, that at the meeting when the same took place, the poll was not kept open two hours; but not having made any allegation in the petition to that effect, the committee were of opinion, that the objection came too late. *Sharon*, 502.
18. The petitioners against an election, having been notified by the committee on elections of the time appointed for hearing them, and having neglected to bring forward evidence in support of their allegations, were deemed to have abandoned their case, and had leave to withdraw their petition. *Russell*, 522.
19. Where the cases of two members, voted for at the same balloting, stood upon the same ground, the fact that one of them was too sick to attend to, or even be informed of, the petition against their election, did not prevent the committee from hearing and deciding the cases of both. *Sandwich*, 523.
20. After a report, granting to petitioners against an election leave to withdraw, had been agreed to, and the time had elapsed within which the vote could be reconsidered, the house recommitted the report to the committee on elections, and, after considering a new report made by them, declared the seat in question vacant. *Webster*, 526.
21. If petitioners fail, after due notice, to present evidence in support of their case, they will be deemed to have abandoned it. *Williamstown*, 526; *South Hadley*, 534.
22. At the hearing of petitioners against a claim for a seat, the committee may consider objections not stated in the petition. *Case of James M. Freeman*, 543.

See CERTIFICATE, 1, 2, 3, 4, 9; EVIDENCE, 7, 8, 10, 15; MEMBERS I., 2, 7, 11, 14; RATABLE POLLS, 1, 2, 3; RETURN, 1, 2, 3, 6.

PRECEPT.

1. Precepts for a new choice will not be issued in cases of illegal election. *Milton*, 146.
2. A member chosen during the sitting of the general court, to fill a vacancy occasioned by the removal of another from the commonwealth, but without a precept, is not entitled to a seat. *Case of Joseph Downe, Jr.*, 244.
3. In the following cases of elections adjudged void, precepts for new elections were refused: — *Weston*, 67; *Milton*, 146; *Wilbraham*, 399; *Princeton*, 422; *Charlestown*, 518. See also *Supplement*, 714.
4. In the following cases, where the seats of members were declared vacant, precepts for new elections were issued: — *Amherst*, 1; *Chesterfield*, 7; *Case of John Williams*, 10; *Woburn*, 302; *Adams*, 326; *Sherburne*, 362; *Barre*, 365. See also *Supplement*, 714.
5. Report of the clerk of the house on the issuing of precepts for new elections, 714.

PRIVILEGE.

1. The judicial courts are competent to decide on a plea of privilege, pleaded by a member of the house of representatives, in bar to an action for slander. *Coffin* v. *Coffin*, 4 Mass. 1.
2. The freedom of deliberation, speech, and debate, secured by the declaration of rights to each house of the legislature, is rather the privilege of the individual members, than of the house as an organized body; being derived from the will of the people, the members are entitled to it, even against the will of the house. *Ib.*
3. The article securing this freedom ought to be construed liberally, that its full design may be answered; and it extends to every act resulting from the nature of the member's office, and done in the execution of it, and exempts him from prosecution for every thing said or done by him, as a representative, whether according to the rules of the house or not. *Ib.*
4. So if he is sitting on a committee in a lobby, or in a convention of the two houses out of the representatives' chamber. *Ib.*
5. A representative is not answerable in a prosecution for defamation, if the words charged were uttered in the execution of his official duty, although spoken maliciously; nor if not uttered in the execution of his official duty, and not maliciously, or with intent to defame. *Ib.*

PROBATE.

See DOMICIL, 2.

PROFESSOR OF LAW IN HARVARD COLLEGE.

See MEMBER, IV., 11.

RATABLE POLLS.

1. Number of representatives; — how determined by the number of ratable polls in the several towns, 24.
2. The election of four members returned from the town of W. S., being questioned, on the ground of a deficiency of ratable polls; and it appearing to be doubtful, after long investigation, whether the town was entitled to return that number; that there had been much difference of opinion, as to the construc-

tion of the term "ratable" in the constitution; and that great diversity of practice had resulted therefrom throughout the commonwealth; the members returned were allowed to retain their seats. *West Springfield*, 64.
3. Mode of ascertaining the number of ratable polls in a town, when an election is controverted on the ground of an insufficiency thereof. *Bath*, 73.
4. Where it had been the immemorial custom for the inhabitants of a town, and the inhabitants of an adjoining unincorporated territory, to unite in the choice of representatives, and they had also been unitedly taxed for the expenses of representation; it was held, that the latter were properly enumerated among the ratable polls of the town, to entitle it to two members. *Oxford*, 75.
5. Whether aliens are ratable polls upon which to predicate a representation—*Quære*. *Boston*, 90.
6. The legislature may, by law, establish what shall or shall not be ratable polls upon which to predicate a representation; the designation thereof being left, by the constitution, to the discretion of future legislatures. *Opinion of the Justices*, 117.
7. The polls of male aliens, above sixteen years of age, are now (1811) ratable polls, within the meaning of the constitution. *Ib.*
8. The polls of aliens may, within the intent of the constitution, be ratable polls, when made liable by the legislature to be rated to public taxes. *Ib.*
9. Ratable polls of aliens may constitutionally be included in estimating the number of ratable polls to determine the number of representatives any town may be entitled to elect. *Ib.*
10. State paupers are not ratable polls. *Westford*, 141.
11. Students at an academy, in a town, where their parents or guardians do not belong, are not ratable polls in such town, if under twenty-one years of age; it seems. *Ib.*
12. Town paupers are not ratable polls. *Woburn*, 152.
13. Transient persons who came into a town a few days before the first day of May, let themselves there as laborers for a few months, and then returned to their homes elsewhere, were held to be ratable polls in such town. *Lynn and Lynnfield*, 171.
14. Whether persons, in the naval or military service of the United States, are ratable polls—*Quære*. *Marblehead*, 172.
15. Attorney-General Austin's report concerning, 308.

See BALLOTING, 3; EVIDENCE, 4, 5, 6, 7, 8; PRACTICE, 7; RIGHT OF REPRESENTATION, 1, 2, 5, 8, 9.

RECOMMITMENT.

See PRACTICE, 20.

RECONSIDERATION.

See ELECTION, 1, 2, 6, 7; MEETING, II., 7; MEETING, IV., 4; VI., 4, 8, 9; PRACTICE, 13, 20.

RECORD.

1. If the record of a town-meeting is intelligible and consistent with itself, and contains every material statement required by law, it is itself the best and highest evidence of the facts therein stated, and must stand for truth, unless impeached as fraudulent; but where it is inconsistent and ambiguous, or deficient as to a material fact, the ambiguity may be explained, or the deficiency supplied, by extraneous evidence. *Braintree*, 395.
2. Where the record of a town-meeting is defective, in not stating the whole number of ballots given in at an election, the defect may be supplied by evidence. *Wilbraham*, 399.
3. Where it appeared, upon examining the record of a town-meeting, that the whole number of votes recorded exceeded the aggregate of the votes for the several candidates, (one member only being voted for,) evidence was received to explain the discrepancy, and to show that the record was erroneous. *Tewksbury*, 427.
4. The clerk of one of the wards in the city of L. having made up his record of the votes given in at an election for representatives, at his own counting-room, after the votes had been declared and the meeting had been dissolved; a transcript of the record thus made was duly signed by the ward officers and sent to the city clerk; and a mistake having been subsequently discovered in the record by the ward officers, they amended it, and sent a transcript of the amended record to the city clerk, by whom the same was laid before the mayor and aldermen, who did not consider themselves authorized to act upon it; it was held, that those persons who received a majority of the votes in all the wards, and not those who received a majority in the *other* wards only, were duly elected. *Case of James Townsend and others*, 642.

See EVIDENCE, 13, 15; OATH; TOWN CLERK, 3, 4, 5.

REFRESHMENTS.

See TREATING.

REMOVAL.

See MEMBER, II., 1, 2, 6; PRECEPT, 2.

REPORTER OF ELECTION CASES, 77, 136.

RESIGNATION.

A person, not legally elected a representative, though holding a certificate of his

election, and having a seat in the house under the same, has no power to resign his seat. *West Cambridge*, 574; See also *Case of Christopher Gore*, 29 *and Note*; *Supplement*, 719.

RESOLVE, DISQUALIFICATION BY.

See MEMBERS, I., 3, 5.

RETURN OF MEMBER.

1. Where two persons were returned, by separate returns, from a town entitled to send one member only, each claiming the seat in opposition to the other, both were suspended from acting as members until the election should be determined. *Hopkinton*, 26.
2. Two members claiming the same seat, having been returned by separate returns, each of which purported to be made by a distinct set of selectmen, both were restrained from voting until their respective claims should be determined. *Harwich*, 38.
3. Where two members were returned, claiming a right to the same seat, both were enjoined not to vote or debate until the validity of their elections should be determined. *Troy*, 56.
4. One, who is duly returned a member, has a right to take a seat and act as such, even though he is not duly elected, and ought not to have been returned. *Chelsea*, 474.
5. A person, who is not returned as a member, has no right to take a seat and act as such, even though he is duly elected, and ought to have been returned. *Case of Thomas Nash, Jr.*, 439.
6. Where two members were chosen in a town, which, from a certificate of the assessors thereof, *as to the number of persons actually taxed therein*, did not appear to contain ratable polls enough to entitle it two members, and one member only was returned;—he was allowed to retain his seat. *Freetown*, 72.
7. Where the election of two members was objected to, on the ground of an insufficiency of ratable polls, and one only was returned, it was held, that the objection did not affect the right of such member. *Sudbury*, 81.
8. Merely certified by a constable. *Paxton*, 20.

See CERTIFICATE; ELECTION, 7; RECORD, 3.

RETURN OF VOTES.

See MAYOR AND ALDERMEN.

RIGHT OF REPRESENTATION.

1. The number of representatives which a town might constitutionally send, before the adoption of the twelfth and thirteenth articles of amendment, was to be determined by the number of ratable polls therein (being free male inhabitants, of sixteen years of age and upwards, not exempted by law from taxation,) at the time of any election. *Danvers*, 49.
2. The provision in the constitution, that every town then incorporated might elect one representative, whether it contained the requisite number of ratable polls or not, extends to towns, which, by their acts of incorporation, were not allowed to send a representative, but, for that purpose, were united to other towns. *Sheffield*, 83.
3. The right to send a representative is a corporate right, which towns may exercise or waive, at their pleasure; and, therefore, if selectmen refuse to put a motion, regularly made and seconded, in town-meeting, "that the town send no representative," or "to see if the town will choose a representative;" but call for and receive votes for a representive, an election so made is void. *Nantucket, Sharon*, 195.
4. The right of a town, to elect a representative, is a corporate right, secured by the constitution, to be exercised only in a corporate capacity; and if a town votes not to elect, or not to elect the whole number to which it is entitled, a minority of the electors, dissenting from such vote, cannot legally proceed to an election. *Opinion of the Justices*, 117, 198.
5. The number of representatives to which a town might be entitled, before the adoption of the twelfth and thirteenth articles of amendment to the constitution, was to be determined by the number of ratable polls therein on the day of election. *Malden*, 293.
6. The question whether an election is valid, in reference to the right of a town to be represented in some future year, is one which is to be determined by the house in which the question of the right occurs. *George Hitchins and others*, 378.
7. On the division of a town, or the annexation of a part of one town to another, the right of representation cannot be divided or apportioned. *Report of the Committee on the Judiciary*, 379.
8. It is not competent for the legislature, when incorporating a new town from territory of one or more existing towns, to authorize such new town to elect a representative to the general court before the next decennial census of polls shall have been taken. *Opinion of the Justices*, 386.
9. But it is competent for the legislature to provide, in such case, that the new town shall remain, as before, a component part of the town or towns from which its territory is taken, for the purpose of electing representatives, until a new decennial census of polls. *Ib.*
10. The legislature have constitutional power to change the boundary lines of towns, for all purposes other than those incident to the election of senators and representatives; but, in changing the boundary lines of towns, by annexing a

part of one town to another, or by constituting a new town from one or more existing towns, the legislature may reserve and secure to the inhabitants, residing on such portion or portions, a right to vote in the election of representatives, with the town or towns from which such portions are taken, until the expiration of the next preceding apportionment of representatives. *Opinion of the Justices*, 634.

11. Whether the decennial census of the inhabitants of a town, taken by the assessors thereof, and returned into the secretary's office, as the basis of the representation of such town for the next ten years, can be shown to be erroneous, with a view to increase the town's right of representation—*Quære*. *Milford*, 609.

See RATABLE POLLS, 1, 2, 3, 4, 5, 6, 7, 8, 9, 15.

RULES OF THE HOUSE, 49, 97, 134, 135, 146, 253.

See also PRACTICE, 9, 10, 11, 12, 13.

SEDITION AND SEDITIOUS CONDUCT.

See MEMBERS, I., 4, 6, 7, 10, 11.

SELECTMEN.

1. Where selectmen, at the time of issuing their warrant for a meeting for the choice of representatives, had not taken the oath required by st. 1836, c. 26, § 4, "respecting all elections and the returns thereof," but took the same on the day of election, before proceeding to open the meeting; this was held to be a sufficient compliance with the statute. *Elliot*, 166.
2. It is essential to the validity of an election, that the selectmen, by whom it is conducted, should be previously sworn, as required by st. 1833. c. 141, § 2, to the faithful discharge of the duties of their office. *Woburn*, 302.
3. Selectmen are not obliged to receive the vote of one, whose name is not on the list, and who does not apply to have it put there at the time appointed by the selectmen, for the purpose of receiving such application. *Lynnfield*, 292.
4. Whether there can be a valid election of a representative without the agency of selectmen—*Quære*. *Case of Dan Hill*. 558.
5. Upon a question of fact, arising at an election, which the selectmen, in the course of their duty, as presiding officers, are bound to determine, their decision is presumed to have been right, until the contrary is clearly proved. *Somerset*, 576.
6. Upon an indictment on Rev. Sts. c. 4, § 8, for giving false answers to the selectmen presiding at a meeting for the election of officers, or for wilfully voting at such meeting, without being qualified, it is not necessary to prove that the selectmen were legally chosen and qualified; it is sufficient, if it is proved that they were acting as selectmen. *Commonwealth* v. *Shaw*, 7 Met. 52.

See ACTION, 1, 2, 3. 5; CERTIFICATE, 1, 2, 3, 4, 5, 9; COLLECTOR; MEETING, II., 2, 3, 4, 5, 9; IV., 1, 2; V., 1. 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 17; VI., 2, 3. 4, 5, 6, 7, 9; VII.; VIII., 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17; PRACTICE, 5; TOWN AND DISTRICT; TOWN CLERK, 1, 2; TOWN-MEETING, CALLING OF, 1, 2; VARIANCE; VOTERS, LIST OF, 1, 2, 3, 4, 5.

SELECTMEN, CERTIFICATE OF.

See EVIDENCE, 3, 4, 12.

SENATORIAL DISTRICTS.

See BOUNDARY LINES, &c.

SICKNESS OF MEMBER PETITIONED AGAINST.

See PRACTICE, 19.

SLANDER.

See PRIVILEGE.

STATUTES CONCERNING ELECTIONS, 686.

STUDENTS AT COLLEGES, &c.

1. The undergraduates of a college, or other literary institution, residing in the town where the same is established, for the purpose merely of pursuing their studies, and with the intention of returning to their homes, whenever their connection with such institution shall be dissolved or severed, do not, by their residence in such town, become legally qualified voters therein. *Report of the Committee on the Judiciary*, 436.
2. The mere facts, that a student, who has a domicil in one town, resides at a public institution in another town, for the sole purpose of obtaining an education, and that he has his means of support from the former, do not constitute a test of his right to vote, and of his liability to be taxed, in the latter town. He obtains this right and incurs this liability only by a change of domicil; and the question, whether he has changed his domicil, is to be decided by all the circumstances of the case. *Opinion of the Justices*, 510.
3. A student of a college does not change his domicil by his occasional residence at the college. *Granby* v. *Amherst*, 7 Mass. 1.
4. A student in the theological institution at Andover, being of age, and otherwise qualified according to the constitution, and being also emancipated from his father's family, is entitled to vote in that town in the election of senators. *Putnam* v. *Johnson*, 10 Mass. 488.

See RATABLE POLLS, 11.

SUNSET.

See MEETING, V., 6, 8, 12, 13, 14, 15.

SUPERINTENDENT OF BREAK-WATER.

See MEMBERS, IV., 14.

SUSPENSION.

See MEMBER, I., 7, 11, 14; RETURN, 1, 2, 3; TREATING, 4.

TAXATION.

See DOMICIL, 8, 12, 13, 14; ELECTORS, II.

TAX-BILLS.

See EVIDENCE, 5.

THORPE'S CASE, 627, *Note.*

TOWN.

See MEETING, III., 2, 3, 4, 5, 6; RIGHT OF REPRESENTATION.

TOWN AND DISTRICT.

The inhabitants of a district, whose act of incorporation authorized them to join with a neighboring town in the choice of representatives, but did not require the selectmen of the latter, in any way, to give notice to the inhabitants of the district of the time and place of meeting for that purpose, were held not to be entitled to vote in such choice, unless they were legally warned to attend the meetings therefor; although they had been accustomed, for many years after the act, to attend the meetings of the town for the choice of representatives, without any warrant being previously issued by the selectmen of the district for the same; and although it had been the practice of the selectmen of the town, for some years, to give seasonable notice of such meetings to the selectmen of the district, who thereupon issued their warrants accordingly to the inhabitants of the same: It was held, also, that if no legal notice of a meeting of the town for the choice of representatives was given to the inhabitants of the district, in consequence of a neglect of the selectmen of the town to give information thereof to the selectmen of the district, the town might nevertheless refuse to receive the votes of the electors of the district, (although after receiving them at one balloting,) and might alone choose a representative. *Lanesborough and New Ashford*, 183.

See CERTIFICATE, 1, 2.

TOWN CLERK.

1. It is not the duty of a town clerk to record anything more than what is declared by the selectmen to be a vote. *Case of Elbridge G. Fuller*, 366.
2. Where a town clerk died, and the selectmen (under the Rev. Sts., c. 15, § 60) appointed a clerk *pro tempore*, who was duly sworn, and acted as clerk at an election of representative; and it did not appear that there was any fraud, or intentional neglect on the part of the selectmen, or any objection on the part of the voters, the election was not thereby invalidated. *Plympton*, 643.
3. Where the record of a town-meeting held on the 1st of March, did not state that it was adjourned to the 2d, it was held, that there was not legal proof of the election of a person chosen as town clerk on the 2d, and that such person could not amend the record of the first meeting, and that parol evidence of an adjournment was inadmissible. *Taylor* v. *Henry*, 2 Pick. 397.
4. One who was formerly a town clerk, but is no longer in the office, cannot amend a town record made by him when town clerk. *Hartwell* v. *Littleton*, 13 Pick. 229.
5. It is competent to one chosen town clerk, to make a record of his own election and qualification. *Briggs* v. *Murdock*, 13 Pick. 305.

See MEETING, VIII., 17; OATH.

TOWN CLERK, CERTIFICATE OF.

See EVIDENCE, 11, 12.

TOWN, DIVISION OF.

See RIGHT OF REPRESENTATION, 7, 10.

TOWN-HOUSE.

See MEETING, III., 8.

TOWN, INCORPORATION OF.

See RIGHT OF REPRESENTATION, 2, 8, 9.

TOWN-MEETING, CALLING OF.

1. Where a town had been accustomed to elect town officers in April, and a number of the inhabitants petitioned the selectmen to call the annual town meeting in March, and the selectmen called a meeting for the purpose of considering the expediency of changing the time of choosing town officers from April to March, which meeting, by reason of the confusion and disturbance therein, was not organized: this was not such an unreasonable refusal to call a meeting, as would authorize a justice of the peace to call and organize a meeting for the choice of town officers: and the election of a representative, at a meeting called by selectmen, so chosen, was held void. *Troy*, 56.
2. The refusal of the selectmen of a town, to admit the voters of a plantation, which had been annexed to it by statute, to act in town affairs, at the annual town-meeting, and to call another meeting for the purpose, was held sufficient to authorize the calling of a town-meet-

ing by a justice of the peace, and the election of other selectmen and town officers. *Adams*, 13.

TOWNS UNITED.

Question as to the mode of conducting the meeting and receiving votes, where towns act together in the choice of representatives. *Lanesborough and New Ashford*, 84.

See CERTIFICATE, 1, 2; MENDON AND BLACKSTONE; RIGHT OF REPRESENTATION, 7.

TRANSIENT PERSONS.

See RATABLE POLLS, 13.

TREATING.

1. Where it appeared, that the member elected had furnished numbers of the electors, both before and after the election, with refreshments of victuals and drink, at his own expense, the election was not thereby invalidated. *Sandford and Alfred*, 55.
2. Where a seat was claimed by one not returned a member, and it was proved, that he had offered to treat the voters, and authorized others to do so, previous to the election, the house rejected a report in favor of the petitioner. *Case of Elbridge G. Fuller*, 366.
3. Treating the voters present at a meeting, at which a candidate was nominated for representative, who was afterwards elected, is not sufficient to set aside the election. *Hubbardston*, 383.
4. Where, in a petition against an election, the member returned was charged with having obtained his election "by bribery, and by corrupting the minds of as many as he could by spirituous liquors," and by other improper and illegal methods, and evidence was offered in support of the charge, it was held, that the house had no constitutional right to suspend the member from acting as such, until the matter of the charge had been heard and determined. *Mansfield*, 17.

UNDERGRADUATES.

See STUDENTS, &c.

UNINCORPORATED PLANTATIONS.

The inhabitants of unincorporated plantations are not included in the description, contained in the constitution, of the persons qualified to give in their votes for governor and lieutenant-governor. *Opinion of the Justices*, 669.

UNINCORPORATED TERRITORY.

See RATABLE POLLS, 4.

USAGE.

See MEETING, III., 2, 3, 5.

VACANCY.

Vacancies in the house, other than those enumerated in the 2d section of the 6th chapter of the constitution, may be filled. *Opinion of the Justices*, 245.

VARIANCE.

An indictment on the Rev. Sts., c. 4, § 8, for wilfully giving false answers to selectman presiding at an election, alleged that such false answers were given by the defendant, with the fraudulent intent to procure his name to be placed on the list of voters, *and* to obtain permission to vote. The evidence was, that the defendant's name was on the list of voters, when he gave the false answers. It was held, that the allegation of the intent to procure his name to be placed on the list of voters could not be rejected as surplusage, and that there was a material variance between the allegation and the proof. *Commonwealth* v. *Shaw*, 7 Met. 52.

VOTE.

See BALLOT; ENVELOPE; INELIGIBLE CANDIDATES.

VOTE, REFUSAL OF.

See ACTION, 1, 2, 3, 5.

VOTERS, FRAUDULENT CONTRIVANCES TO MAKE.

See *North Brookfield*, 137.

VOTERS, LIST OF.

1. An election having taken place at a meeting, previous to which the selectmen held no session for examining the qualifications of voters, as required by st. 1800, c. 74, § 1, and at which they exhibited no list of votes; the election was held valid. *Fryeburgh*, 41.
2. Where a list of voters for governor, lieutenant-governor, and senators, was seasonably made out and published by the selectmen, and was duly corrected and revised by them with reference to and as a list for the election of representatives, but was not again published, though carried by them to the meeting; it was held, that this omission to publish was not sufficient of itself to invalidate the election. *Malden*, 213.
3. The validity of an election is not affected by a neglect of the selectmen to hold a meeting, one hour previous to the town-meeting, for the revision of the list of voters, as required by statute. *Holliston*, 297.
4. M. applied to one of the selectmen on the morning before an election to have his name put on the list of voters. A friend applied, also, in his behalf, for the same purpose, to another selectman. Both these officers promised to put the name on the list, but omitted to do so. M's vote, however, was received at the

poll; but upon its appearing that his name was not on the list, he was directed to remove his vote from the ballot-box, and did so. It was held, that M. was a legal voter, and that his vote was wrongfully rejected. *Webster*, 526.
5. Selectmen have authority, even after the opening of a town-meeting, to strike from the list of voters the name of a person who is not a legal voter. *Humphrey* v. *Kingman*, 5 Met. 162.
6. The provision in st. 1821, c. 100, and st. 1822, c. 104, requiring that previous to an election the qualifications of voters shall be proved and their names be placed on an alphabetical list or register, is not to be regarded as prescribing a qualification in addition to those, which, by the constitution, entitle a citizen to vote, but only as a reasonable regulation of the mode of exercising the right of voting, which it was competent to the legislature to make. *Capen* v. *Foster*, 12 Pick. 485. See also *Methuen*, 428.

See ACTION, 5; COLLECTOR; MEETING, VI., 11, VII., 7, 10, 11, 12, 13, 18, 19; SELECTMEN, 3; VARIANCE; VOTING, ILLEGAL, 2.

VOTES, RECEPTION OF ILLEGAL, OR REJECTION OF LEGAL.

1. If selectmen, at an election for representative, receive illegal votes for the person elected, which are counted, or reject legal votes for other candidates, which are not counted, in estimating the whole number of votes given in, and the votes so received or rejected are sufficient in number to change the majority, the election will be void. *Western*, 144.
2. It is no objection to an election, that illegal votes were received, or legal votes rejected, unless the majority is thereby changed. *Blandford* v. *Gibbs*, 2 Cush. 39.
3. Where a member was elected by ninety-two out of one hundred and thirty-two votes given in, it was held, that the reception of one illegal vote, if proved, would not invalidate the election. *Charlemont*, 261.
4. The reception of illegal votes, not sufficient in number to affect the majority, will not invalidate an election. *Tyringham*, 266; *Marblehead*, 295; *Sudbury* v. *Stearns*, 21 Pick. 148.
5. The reception of illegal votes, sufficient in number to change or prevent a majority, is not sufficient to invalidate an election, unless it also appears that such votes were for the person elected. *Ashfield*, 583.
6. Several illegal voters having been permitted to vote at a parish meeting, in the election of officers, many of the legal voters protested against the proceeding and withdrew without voting; but the persons declared to be elected having received the votes of a majority of the legal voters who remained and voted, it was held, that they were duly elected. *Sudbury* v. *Stearns*, 21 Pick. 148.
7. Where a member returned was elected by a majority of one vote, and it appeared that several persons, legally qualified, who were present and desired to vote at the election, were prohibited by the selectmen from doing so, the election was held void, although it did not appear, that any more than one of the rejected voters would have voted against the sitting member, if they had been permitted to vote. *Weston*, 67.
8. The rejection of a legal vote will not invalidate an election, unless the majority would have been changed or prevented by its reception. *Shrewsbury*, 275; *Chester*, 664; *Hopkinton*, 654.
9. The rejection of the vote of a qualified voter, whose name was not on the list, when tendered in the balloting for state and county officers, is no objection to the election of a representative, made subsequently, in which such voter did not tender his vote, although all the elections were made at the same meeting, and the same list of voters was used. *Shrewsbury*, 275.
10. In order to entitle a rejected vote to be counted, the voter must attend the meeting, and tender his vote at the balloting when the election takes place; and it is not sufficient that the voter's name is not on the list of voters, in consequence of which he does not attend the meeting, or that he tenders his vote and is refused at any other balloting. *Brookfield*, 459.

VOTES, WHOLE NUMBER OF.

1. If it cannot be ascertained (either by the record, or by evidence) what was the whole number of votes given in at an election, it is void, for uncertainty. *Braintree*, 395.
2. Where an election of several persons takes place, at the same time, who are all voted for on one list, the proper mode of ascertaining the whole number of votes is not by cutting and severing the ballots into single tickets, and counting the aggregate, but only by counting each ballot as one vote, whether it have on it the requisite number of names or not. *Wrentham*, 70; *Charlestown*, 167; *Newbury*, 191; *Lynn*, 281; *Wilbraham*, 399.

See INELIGIBLE CANDIDATES; MEETING, VIII., 2, 3, 4, 5, 12; RECORD, 3.

VOTING, ILLEGAL.

1. Under the act of 1813, c. 68, § 3, (Rev. Sts. c. 4, § 6,) against illegal voting, a person, to come within the statute, must know, at the time of his voting, that he is not a qualified voter, and that he is doing or attempting to do an unlawful act. *Commonwealth* v. *Agler*, Thach. Cr. C. 412.

2. Although the name of an unqualified person may be borne on the list of voters by mistake, it will not authorize him to vote. The name on the list will justify the inspectors to receive his vote. But if they refuse to receive the vote of an unqualified person, although it is borne on the list, such refusal will be no injury to him, nor any just ground of complaint. *Ib.*
3. To constitute a wilful aider and abettor in such an offence, under the act, § 3 (Rev. Sts. c. 4, § 9,) he must know at the time, that the principal was an unqualified voter, and had no right to vote, and with such knowledge, he must have said or done something designed and calculated to encourage him to vote. *Ib.*
4. Where a person was indicted for aiding and abetting another in illegal voting, under the act of 1813, c. 68, § 3, knowledge that the principal was an unqualified voter is not to be presumed, in such case, but is to be alleged and proved like any other fact. *Ib.*
5. If a foreigner honestly believes, at the time of voting, that he has a right to vote, it is not a wilful act within the statute of 1813, c. 68, § 3, (Rev. Sts. c. 4, § 6). So, if the aider and abettor honestly believes that the foreigner had a right to vote, he is entitled to an acquittal. *Ib.*
6. Where one votes at an election, whose name is upon the list of voters, when he is not legally qualified to vote, it is a question of fact for the jury, whether he committed the offence wilfully. *Commonwealth* v. *Wallace*, Thach. Cr. C. 592.
7. It is no cause for arresting judgment on an indictment for giving false answers to selectmen, and for voting wilfully, and without being qualified, for governor, lieutenant-governor, and senators for the district of M., that it is not alleged that the district of M. is in the commonwealth. *Commonwealth* v. *Shaw*, 7 Met. 52.
8. If a party who is indicted on the Rev. Sts. c. 4, § 6, for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, admits, on his trial, that he voted at the election, it is equivalent to an admission that he voted wilfully. *Commonwealth* v. *Bradford*, 9 Met. 268.
9. Evidence that a party consulted counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right, is admissible in his favor, on the trial of an indictment against him for wilfully voting, knowing himself not to be a qualified voter, but is not conclusive evidence that he did not know that he was not a qualified voter. *Ib.*

See EVIDENCE, 13, 14.

WARD CLERK.

See RECORD, 4.

ERRATA.

Page 13, line 4 from top, strike out the period and insert a comma.
" 32, lines 5 and 14 from top, for "chose," read "choose."
" 41, last line of abstract to Fryeburgh, for "votes," read "voters."
" 166, lines 11 from top and 4 from bottom, for "1805," read "1806."
" 293, line 7 from top, for "were" read "was."
" 612, line 7 from top, strike out the period and insert a semicolon.
" 732. The title MEMBERS, QUALIFICATIONS OF, in the Index, is several times referred to, on this and succeeding pages, by the word MEMBER, I., II., &c.
" 734, right hand, line 25 from top, for "surperseded," read "superseded."
" 735, right hand, lines 26 and 27 from bottom, for "portion," read "poll-tax."
" 736, left hand, line 6 from bottom, for "envolope," read "envelope."
" 737, line 15 from bottom, strike out "11."
" 742, left hand, line 10 from top, for "16," read "17."
" 745, right hand, line 9 from bottom, for "19" read "PRACTICE, 3."
" 748, right hand, line 18 from top, for "3" read "4."
" 755, right hand, line 27 from bottom, for "votes" read "voters."

Stanford Law Library
3 6105 063 585 496

Stanford Law Library
3 6105 063 585 496